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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-385

In the Matter of
YORK INTERNATIONAL BUILDING, INC.,

Debtor-Appellant,

and

DR. RICHARD YOU,

Stockholder-Appellant,

vs.

AARON M. CHANEY,

Trustee-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

APPENDICES "A", "B", & "C"

HELEN B. RYAN
1136 Union Mall
Suite 207
Honolulu, Hawaii 96813
Attorney for Appellants

Of Counsel:
RYAN & RYAN

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vs.

AARON M. CHANEY,

Trustee-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 12, 1974.

OPINIONS BELOW

The unpublished memorandum of the United States Court of Appeals for the Ninth Circuit, is reproduced as Appendix "A" to this petition. The unpublished order of the federal district court for the District of Hawaii is reproduced as Appendix "B" to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 12, 1974, affirming the judgment of the court below (United States District Court for the District of Hawaii). Notice of entry of judgment is attached hereto as Appendix "C". Jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

This case concerns the protections afforded by the Fifth Amendment in reorganization proceedings, where parties may be deprived of their property without due process of law and without just compensation. Review by this Court is also sought to secure uniformity of decision as to

sales under 11 U.S.C., Sec. 516(3) as among the various circuit courts of appeals, consonant with this Court's decision in Fidelity Assurance Association v. Sims, 318 U.S. 608 (1943).

The questions raised are these:

1. Can a Chapter X proceeding for reorganization, absent an emergency or danger to the assets, be turned into a liquidation proceeding in disregard to the express interpretation handed down by this Court in Fidelity Assurance Association v. Sims, 318 U.S. 608 (1943)?

2. In light of the existing conflict among the various circuit courts as to the presence or absence of restrictions on sales under 11 U.S.C., Sec. 516(3), will this Court grant certiorari to provide uniformity of justice for corporations who are entitled to relief under Chapter X?

3. Where a Chapter X proceeding is changed from reorganization to liquidation, and the liquidating sale is held without notice, without upset price and without bidding, and where there is no emergency and the debtor has not

been declared bankrupt, are the corporate debtor and stockholders and unsecured creditors deprived of procedural due process?

4. Where a stockholder in a debtor corporation (the principal asset of which is an office building on leasehold land), at the urging of the trustee conveys the fee (which he holds) to the trustee to avoid aborting the Chapter X proceedings and where the trustee, by court order, then sells the principal asset (including the fee) over the objection of the stockholder and without compensation to the stockholder, has the stockholder been deprived by the federal court of his property without due process of law and without just compensation?

REASONS FOR GRANTING THE WRIT

This petition raises significant issues concerning the reach of 11 U.S.C., Sec. 516(3), as well as the deprivation of property without due process of law.

A. Contrary to the Philosophy Expressed by This Court in Fidelity Assurance Association v. Sims, 318 U. S. 608 (1943), the

Courts Below Turned a Chapter X Case Into a Liquidating Proceeding.

The decisions of the courts below have decided an important question of federal law which, if it is not controlled by Fidelity Assurance, supra, has not been but should be settled by this Court.

In holding that the district court could sell the assets of a debtor by court order, not in pursuance to a plan of reorganization, where there was no emergency and no imminent danger to the assets, the Ninth Circuit Court of Appeals relied on 11 U.S.C., Sec. 516(3). The opinion of the court below decides an important question of federal bankruptcy law in a manner totally at variance with Fidelity Assurance. The Ninth Circuit has in the past, and presumably will in the future, adopt the attitude expressed in In Re Dania Corporation, 400 F.2d 833 (CA 5th, 1968), to the effect that Fidelity Assurance does not apply to the problem presented here. (See citation of In Re Dania in the Ninth Circuit case, In

the Matter of Equity Funding Corp. of America, 492 F. 2d 793 [CA 9th, 1974].)

Certainly the lodestar of Fidelity Assurance is its express finding that Congress intended Chapter X to be used for the reorganization of the corporation, and "if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceedings . . . the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright . . ." (ibid., 318 U.S. 621).

This petition should be considered by this Court in order to determine whether Fidelity Assurance does apply. The answer will affect not only the petitioning debtor, but will offer protection, if the answer is affirmative, to many corporations who, in the Ninth Circuit at least, now hesitate to undertake reorganization when the process may end up in liquidation.

B. The Decision of the Court Below Involves a Direct Conflict with Decisions of the Second and Third Circuits of the United States Court of Appeals.

In deciding the case below, the Ninth Circuit continued to pursue a course which it knew to be in conflict with decisions in other circuits.

In Re Solar Mfg. Corp., 176 F.2d 493 (CA 3rd., 1949), and In Re Penn. Petroleum, 188 F.2d 851 (CA 2d, 1951), are undoubtedly the leading cases on the limitations to the authority of a court to order a liquidation sale where the petitioner has come into court seeking a reorganization or an arrangement.

In 1970 the Ninth Circuit in In Re Wonderbowl, Inc., 424 F.2d 178, 180, commented upon the conflict among the circuits and supported its position that 11 U.S.C., Sec. 516(3), permitted a liquidating sale, even in the absence of an emergency, citing 6 Collier on Bankruptcy, Sec. 327, p. 627, f. 25. However, the said citation at 424 F.2d 180, omits the following portion from the Collier discussion:

"But see In Re Pure Penn. Petroleum Co., Inc., (C.A. 2d 1951) 188 F.2d 851, noted (1952) 65 Harv. L. Rev. 686, 37 Cornell L. Q. 271, where a divided court approved the Solar case and applied its restrictive interpretation to § 313(2) dealing with sales under Chapter XI arrangements."

It is also to be noted that Frank v. Drinc-Omatic, 136 F.2d 906, (CA 2d., 1943), cited by the Ninth Circuit as disapproving Solar (In Re Wonderbowl, Inc., 424 F.2d 178) is a short case, apparently involving an emergency situation. In contrast, In Re Pure Penn. Petroleum, supra, also from the Second Circuit, actually extended the Solar reasoning.

Again, in 1974, when the Ninth Circuit decided In the Matter of Equity Funding Corp. of America, 492 F.2d 793, it rejected the argument of appellants based on In Re Solar, ". . . that a § 116(3) [11 U.S.C., Sec. 516(3)] sale may be authorized only in an emergency or where there is imminent danger of loss to the corporation."

The Equity Funding Corp. case goes on to reiterate the differing views among circuits,

this time citing In Re Marathon Foundry & Machine Co., 228 F.2d 594 (CA 7th, 1955), in support of its position. However, a reading of the latter case shows that there was an emergency and that the asset sold was stock in another corporation which was not used in the conduct of debtor's business, and the trustee did not have funds on hand to redeem same.

It is respectfully submitted that this conflict of opinion among the several United States Circuit Court of Appeals eliminates equality of justice in an area which may become increasingly sensitive under present economic pressures: the corporate reorganization.

C. The Decision of the Court Below Raises Questions of Procedural Due Process Which Demand the Application of the Solar and Fidelity Assurance Cases.

As stated in Solar: "Reorganization proceedings are for the purpose of readjusting a business life so it can continue, not for dividing up its effects after the enterprise has died." Solar then cites and compares 11 U.S.C., Sec.

616(10) with 11 U.S.C., Sec. 516(3), pointing out that a sale under Sec. 516(3), " . . . is not surrounded by the rather elaborate safeguards which the Congress has provided to protect the interests of those whose money is tied up in the tottering enterprise. And it gives those interested parties no opportunity to vote on a plan after it has already had the benefit of Court scrutiny and approval. Neither does such peremptory sale have the substantial safeguards surrounding the ordinary bankruptcy proceedings."

In the case out of which this petition arises, the elaborate protective provisions of Chapter X were short circuited without following any of the usual statutory procedures.

Further, the trustee took the position that the debtor's assets were rendered "perishable" by the fact that the Lims' offer was conditioned upon almost immediate acceptance. As stated in Solar:

> " . . . This contention asserts the self-destructive proposition that an offer of purchase may itself beget the emergency

and suggests that an impatient purchaser may stampede a reorganization court out of the safeguards of Chapter X . . . " (176 F.2d at 495.)

The decisions of the Ninth Circuit propose that a bankruptcy court may, whenever it suits its judgment, order a sale of the debtor's assets and completely by-pass Chapter X procedures and protections. It is respectfully submitted that this denies due process of law and equal protection of the law to all such debtors who are so selected out, and to all their creditors and stockholders.

D. The Decision Deprived Stockholder You Of His Property Without Due Process of Law.

The appellate court approved the actions of the trustee who, by use of threat of aborting the Chapter X proceeding, persuaded the stockholder owner of the fee to convey the same to the trustee and to subordinate his stock. The trustee then proceeded to sell the entire property (including the fee), over the objection of the stockholder, and with no return to the stockholder-fee

owner from the proceeds.

In this case, and in this manner, stockholder and former fee owner You was deprived of his property by court action without due process of law and without just compensation. It is respectfully submitted that this Court should exercise its inherent power of supervision over the administration of the federal district courts and decide whether 11 U.S.C., Sec. 516(3) can be employed to decree a sale of the assets of a debtor under Chapter X, absent any emergency, particularly where a portion of the assets sold had been contributed to the debtor by a stockholder during the pendency of the federal court proceedings and at the urging of the court and the officer of the court; viz, the trustee.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part that:

> "No person . . . shall be . . . deprived of . . . property, without due process of law . . . without just compensation."

STATUTES AND RULE INVOLVED

This case also involves:

11 U.S.C., Section 516(3):

"Special powers enumerated. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter [§501 et seq. of this title] conferred and imposed upon him and the court--

"(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; . . ."

11 U.S.C., Section 587:

"Trustee's rights, powers, and duties. Where not inconsistent with the provisions of this chapter [§501 et seq. of this title], a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 44 of this Act [§72 of this title], and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor."

11 U.S.C., Section 606:

"Persons entitled to be heard. The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter [§501 et seq. of this title]. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

Rule 7(b), Federal Rules of Civil Procedure:

"Pleadings Allowed; Form of Motions.

"(b) Motions and Other Papers.

"(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

INTRODUCTORY STATEMENT

This petition presents to this Court the question whether reversible error was committed when the United States District Court for the District of Hawaii ordered the sale of the assets of the debtor: (1) after the assets (downtown office building in Honolulu) had been operated at a profit by the Trustee in possession for a period of four and one-half years under the auspices of Chapter X; (2) in preference to a plan of reorganization; (3) absent any emergency or danger to the assets; (4) without notice of the particular sale; (5) without upset price or bidding; (6) without declaring the debtor bankrupt; and (7) where sale included not only the leasehold interest owned by the debtor at the time the reorganization petition was filed, but the fee, which had been contributed by Stockholder You under the threat that the Chapter X proceedings would be aborted if the assets were not enhanced by the fee.

This petition also shows to this Court the

need to make uniform among the United States Court of Appeals the substantive and procedural requirements for a sale under 11 U.S.C., Sec. 516(3), the Ninth Circuit having affirmed the sale described above, and having found that the same was authorized under the said section of the Code.

STATEMENT OF THE CASE

A. The History of Debtor Under Chapter X.

On September 23, 1968, principal Stockholder You and his fellow corporate officers took York International Building, Inc. into the United States District Court for the District of Hawaii, under Chapter X, (BK-68-293) because the corporation was unable to meet its debts as they accrued. It was in need of relief. The stockholders desired, in good faith, to effect a plan of reorganization. The pendency of Massachusetts Mutual's foreclosure action in the state court was conclusive proof of financial distress warranting the intervention of the reorganization court (R. 2-3; 59).

Aaron M. Chaney, who had been appointed foreclosure commissioner in the state court, was appointed Chapter X trustee (R. 9-17) and placed in possession of the property, a twelve-story leasehold office building in downtown Honolulu.

On November 14, 1968, Massachusetts Mutual filed an "Application to Dismiss Debtor's Petition," pointing out that the debtor was merely a lessee on the real property owned by Dr. You, and asserting that the value of the leasehold and the improvements was not sufficient to pay the Massachusetts Mutual mortgage in the amount of $1,310,506.40 (R. 56-58).

In the exchanges that followed, the trustee asked the court for permission to sell (Tr. 16) and Massachusetts Mutual filed a memorandum stating that the federal district court had no authority in a Chapter X proceeding to order a sale of all the assets of the debtor in lieu of a plan of reorganization or in the absence of an emergency (R. 86-95).

On February 3, 1969, the attorney for

Trustee Chaney, in open court, asked if Dr. You would "contribute the ownership of the fee to the corporation for the purpose of working out a plan of reorganization to the extent that the creditors are now paid off . . ." (Tr. 45).

Massachusetts Mutual continued to push for the return to the state court and foreclosure, and the trustee's attorney continued to press Dr. You for the conveyance of the fee (time records, R. 653, 613).

By July 22, 1969, an appraisal had come in at $1,910,000; Dr. You had agreed to convey the fee; the trustee asked that he be continued for a year in which time there was a reasonable possibility that a feasible plan of reorganization could be achieved (Tr. 6-21).

The Massachusetts Mutual petition to dismiss the application was then denied (R. 228-232).

Further scurmishings between the trustee on one side and Dr. You and his nephew, Dunn, on the other resulted in subordination of their

stockholdings in the amount of $180,000.

On December 3, 1970, the trustee announced:

> "The corporation, at the commencement of this proceeding, owned only a long-term leasehold estate in the real property referred to above; however, the Trustee has been successful in getting the remainder interest, previously held by certain creditors and stockholders, transferred to him and he now holds the property in fee simple. This will substantially aid efforts to reorganize the corporation." (R. 817.)

The trustee then invited suggestions from all creditors, stockholders and other parties in interest for a formulation of a plan of reorganization (R. 821).

Massachusetts Mutual promptly responded under date of February 4, 1971, with a "plan" of reorganization which was merely an offer to purchase for $1,450,000, the property which had been appraised at $1,910,000.

The trustee was ordered to file a plan of his own, or report the reasons why a plan could not be effected (March 16, 1972, R. 1039).

By March 28, 1972, interim compensation

was allowed the trustee as follows:

5% of gross rentals	$ 45,955.66
Royal Maintenance (a subsidiary of Aaron M. Chaney).....	49,504.18
Commissions to salesmen employed by Aaron M. Chaney ...	15,967.58
	$111,427.42

Mr. Chaney then applied for and was granted an additional $30,000 for "extraordinary services" (Tr. 4/14/72, pp. 32-34; Order, R. 1129).

On May 8, 1972, the federal district court denied Massachusetts Mutual's application and struck its plan of reorganization (R. 1133-1136).

On December 29, 1972, Trustee Chaney filed an "Application for Approval of Sale of Real Estate or Approval of Plan or Other Instructions" (R. 1163-1196).

The offer of sale noticed was from a specified purchaser at a specified price, to purchase 16,000 square feet of fee simple land and a twelve-story office building. The plan of reorganization submitted simultaneously stated that only unsecured claims, outside old common stock and subordinated old common stock were affected

by the plan and entitled to vote on it.

In the hearings held in February on various continued dates, Massachusetts Mutual objected to reorganization on the grounds that it only brought its mortgage current and did not accelerate it (Tr. 2/5/73, p. 2). Stockholder You and the debtor objected to the sale because the price was below appraisal, paid nothing to the stockholders, and only a percentage on unsecured claims (Tr. 2/5/73, p. 2).

On February 5, 1973, the trustee testified that the reorganization plan was feasible (Tr. 38-48).

The transcripts show that the proceedings, continued to February 21, 1973 (Tr. 2/5/73, p. 161) commenced on that date at 4:05 P.M. At that place and time, the attorney for the trustee announced a "new development," that is, a new offer from new purchasers. Copies of said offer had not been distributed prior to the hearing, yet, despite complete lack of notice, and despite objections, the "new offer" was accepted by the

court before it adjourned at 5:10 P. M.

The Order Authorizing Sale of Real Property was entered on March 2, 1973 (R. 1235-1240; Appendix "B").

B. The History of the Appeal to the Ninth Circuit Court of Appeals.

Notice of Appeal from the Order Authorizing Sale of Real Property was filed on April 2, 1973 (R. 1267-1268).

On July 11, 1973, after a fruitless effort to obtain the same relief in the court below, Trustee Chaney, through his attorney, moved to dismiss the appeal in the Ninth Circuit, which said motion was renewed on August 9, 1973, after the appeal was docketed. In this motion, the trustee alleged that the sale had been consummated. The Ninth Circuit denied the renewed motion to dismiss.

The appeal was fully briefed and argued orally before the Ninth Circuit Court. The appellants before that court, as here, submitted that they had been deprived of their property without

due process of law: "When, in a reorganization proceeding under Chapter X, (the federal district court) disposes of Debtor's entire assets by accepting a 'plan' or 'offer to purchase' without any prior notice to the Debtor, creditors and stockholders, and without any vote . . ." (O. B., pp. 1-2). The appellants further submitted that by the sale, Stockholder You had been deprived of his property in violation of the Fifth Amendment: "Where, under threat of aborting the Chapter X proceedings, a trustee obtains fee simple title to the Debtor's leasehold property from the fee-owner, together with a stipulation to subordinate his common stock . . ." (O. B., p. 2). Then followed additional questions concerning Chapter X; viz, the effect of failure to serve notice in accordance with 11 U.S.C., Sec. 606, and Rule 7(b), F.R.C.P.; the effect of aborting Chapter X proceedings by the sale of the Debtor's sole asset without declaring the Debtor bankrupt. (O. B., pp. 2-3.)

In his answering brief, the trustee replied

first with a puffery on the services he had performed for the debtor, but as he came down to the merits, he asserted that ". . . a sale of property is entirely different from a plan of reorganization and the procedures to be followed are also entirely different." (A.B., p. 10); and ". . . the complicated provisions and procedures for plans of reorganization under Chapter X cannot be forced to fit sales of property . . ." (A.B., p. 13). The trustee then cited 11 U.S.C., Sec. 516(3) and 6 Collier on Bankruptcy, Sec. 3.27(2) at p. 623, omitting footnotes (A.B., pp. 17-18).

The appellants' Reply Brief, below, dealt extensively with the lack of due process, the lack of emergency, contrasted with the rush in putting through the sale to the last offerers, the Lims. It pointed out to the Ninth Circuit that the Lims were not bona fide purchasers without notice.

It also pointed out that the effect of the sale was to bankrupt a corporation which had been reorganizable (A.B., pp. 12-13).

The Ninth Circuit made short work of the case, finding that "The sale in question was not a reorganization plan, nor was it made pursuant to such a plan. It was made in lieu of such a plan, was authorized under 11 U.S.C., § 516(3), and was made in conformity with that section. The court did not abuse its discretion in ordering or approving the sale." (Appendix "A".)

The rest of the points on appeal were dismissed as frivolous, not before the court, or moot.

Thus, the Ninth Circuit Court declared that a sale under 11 U.S.C., Sec. 516(3), is a legally acceptable alternative which can be forced upon a corporation which goes into the federal court for reorganization under Chapter X, and may be ordered without any of the attendant procedural safeguards required by Congress under other sections of the Bankruptcy Act.

Today's social problems require something more in the way of procedural protection and substantive due process, as well as equality in

the administration of justice, than is displayed by this case.

The Ninth Circuit Court's decision erroneously construes and applies 11 U.S.C., Sec. 516(3), and the said circuit court will continue to cause irreparable harm by so doing, until reversed by the Supreme Court of the United States.

This is a petition which requires plenary review.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to grant the writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawaii, September 30, 1974.

Respectfully submitted:

Helen B. Ryan

HELEN B. RYAN
Suite 207
1136 Union Mall
Honolulu, Hawaii 96813
Attorney for Appellants

APPENDIX "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of YORK INTERNATIONAL BUILDING, INC., *Debtor-Appellant,* and DR. RICHARD YOU, *Stockholder-Appellant,* vs. AARON M. CHANEY, *Trustee-Appellee.*	No. 73-2209

[July 12, 1974]

On Appeal from the United States District Court
for the District of Hawaii

Before: DUNIWAY and SNEED, Circuit Judges,
and CARR,* District Judge

MEMORANDUM

The sale in question was not a reorganization plan, nor was it made pursuant to such a plan. It was in lieu of such a plan, was authorized under 11 U.S.C. §516(3), and was made in conformity with that section. The court did not abuse its discretion in ordering or in approving the sale.

Appellants' remaining contentions fall into three categories: some are frivolous, others are not properly before us in this appeal, and others are mooted by our decision as to the sale. None merits consideration here.

Affirmed.

*The Honorable Charles H. Carr, United States District Judge for the Central District of California, sitting by designation.

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APPENDIX "B"

ORDER AUTHORIZING SALE OF REAL PROPERTY

At Honolulu, in said district, this 2 day of March, 1973

The Trustee's Application for Approval of Sale of Real Estate or Approval of Plan or Other Instructions duly came on for hearing on January 19, 1973 and for further hearings on February 5, 1973, February 6, 1973, and February 21, 1973.

Notice of said hearing was given as prescribed by this Court in its Order of December 29, 1972.

The following parties and attorneys appeared:

Aaron M. Chaney, Trustee

H. William Burgess, Attorney for Trustee

Dr. Richard W. You, Stockholder and former Officer and Director of Debtor, who opposed the sale of real estate and asked for an extension of time within which to raise new capital.

Edward Y. N. Kim, Attorney for Debtor,

who opposed the sale and also requested the same extension of time as requested by Dr. You.

Thomas P. Huber, Attorney for Massachusetts Mutual Life Insurance Company, the first priority secured creditor, who opposed the Plan of Reorganization but favored the sale of the real estate.

Kwan Hi Lim, Attorney for Liberty Bank and Mid-Pac Lumber, secured creditors, who opposed the Plan but favored the sale of the real estate.

Wilfred H. C. Youth, Attorney for Kenneth and Rose Dunn, secured creditors ($60,000) and unsecured creditors (an additional $60,000), who opposed the Plan but favored the sale of the real estate.

The Court has considered the evidence, arguments, and authorities presented by all parties and finds as follows:

1. The Debtor and its principal stockholder, Dr. Richard W. You, have exerted commendable efforts, have shown the best of intentions and have expressed great hope of being able to find additional equity capital. However, in the four and one-half years since this proceedings started no new equity capital has been produced. Further delay at this point would jeopardize a favorable sale for the estate and is not warranted.

2. The Plan of Reorganization, while fair and equitable, is of marginal feasibility without the contribution of substantial new equity capital and therefore is not approved.

3. The real property located at 1270 Queen Emma Street, more particularly described in Exhibit "A" attached hereto is in the possession of the Trustee and is subject to certain liens, encumbrances and interests.

4. Said real property was appraised by the court appointed appraiser, John J. Hulten, M.A.I., for One Million Nine Hundred Thousand

Dollars and subsequently by Mr. Philip W. Won, M.A.I., who was engaged by the Debtor, for Two Million Three Hundred Thousand Dollars.

5. During the years of administration of this estate the Trustee has exerted diligent efforts to sell said real property, has advertised it for sale from time to time in local and national newspapers, has placed a "For Sale" sign on the premises, has prepared sales brochures, rent rolls, financial statements, has shown it to numerous persons and has contacted and been contacted by numerous prospective purchasers, none of whom have made offers as favorable as the present one.

6. There is an equity in said property over and above all liens, encumbrances and interests.

7. It is in the best interest of this estate that said real property be sold free and clear of all liens, encumbrances and interests (except for the lien of the mortgage of Massachusetts Mutual Life Insurance Company which is to be assumed, as modified, by the purchasers) and that the

rights of all creditors (except Massachusetts Mutual Life Insurance Company) in said property be transferred to the proceeds derived from the sale thereof.

8. The offer received by the Trustee from Max Sung Hi Lim and Lily S. M. Lim, dated February 19, 1973, to purchase said real property for a total purchase price of One Million Seven Hundred Fifty Thousand Dollars, net of real estate commission, upon the terms and conditions as set forth in the Offer dated February 19, 1973, filed in Court on February 21, 1973 as Trustee's Exhibit 17, is a fair and reasonable price therefor. The Lim offer is more favorable to this estate than the One Million Seven Hundred Sixty Six Thousand Dollar offer from National Securities and Investment, Inc. which requires payment of a Fifty Thousand Dollar real estate commission and which has less cash down.

9. It is in the best interest of said estate that said sale be approved and authorized.

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that the sale of the real property located at 1270 Queen Emma Street, Honolulu, Hawaii, consisting of a 12 story office building and approximately 16,000 square feet of fee simple land, more particularly described in Exhibit "A" attached hereto, to Max Sung Hi Lim and Lily S. M. Lim, husband and wife, is approved and confirmed and the said Trustee is directed to execute and deliver to said purchasers a good and sufficient deed to said property free and clear of all encumbrances except as noted on Exhibit "A" attached hereto, the deed to provide that the mortgage of Massachusetts Mutual Life Insurance Company shall be assumed, as modified, by the said purchasers, and

IT IS FURTHER ORDERED that the rights of all creditors herein holding liens, encumbrances or interests in or upon said real property (except for Massachusetts Mutual Life Insurance Company) be and they hereby are transferred to the proceeds derived from the sale hereof.

/s/ Martin Pence
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ H. William Burgess
H. WILLIAM BURGESS
Attorney for Trustee

/s/ Edward Y. N. Kim
EDWARD Y. N. KIM
Attorney for Debtor

/s/ Robert B. Bunn
for THOMAS P. HUBER
Attorney for Massachusetts Mutual Life Insurance Company

/s/ Kwan Hi Lim
KWAN HI LIM
Attorney for Liberty Bank and Mid-Pac Lumber

/s/ Wilfred H. C. Youth
WILFRED H. C. YOUTH
Attorney for Kenneth Dunn and Rose Dunn

APPENDIX "C"

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

JUL 15 1974

Re: No. 73-2209 IN THE MATTER OF YORK INTERNATIONAL BUILDING, INC. AND DR. RICHARD YOU VS. AARON M. CHANEY

Dear Sir:

An memorandum in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 7-12-74 affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing if filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

, Clerk
U.S. Court of Appeals

NOV 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-385

In the Matter of
YORK INTERNATIONAL BUILDING, INC.,

Debtor-Appellant,

and

DR. RICHARD YOU,

Stockholder-Appellant,

vs.

AARON M. CHANEY,

Trustee-Appellee.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The only question presented by the Petition For Writ Of Certiorari is:

Are there any "...special and important reasons..." to review this case on writ of certiorari?

STATEMENT OF THE CASE

The Statement of the Case contained on pages 1 through 9 of the Brief of Appellee Aaron M. Chaney, Trustee, filed in the United States Court of Appeals for the Ninth Circuit on November 16, 1973, a true copy of which is attached hereto as Exhibit "A", will supplement Appellants' Statement of the Case and will assist this court in understanding the background of this case.

ARGUMENT

The Petition for Writ of Certiorari should be denied because (1) the appeal does not merit any further review, (2)

there are no "...special and important reasons..." to review this case and (3) review would cause delay and needless expense to the estate.

1. The Appeal Does Not Merit Any Further Review.

The contentions in the Petition For Writ of Certiorari are generally the same as those in Appellants' Brief before the Ninth Circuit. Some of these contentions were never raised before the trial court. (For example, Appellants' argument that Appellant by voluntarily conveying the land to the Trustee over four years ago was deprived of his property without just compensation, was raised for the first time on appeal.)

Some of the contentions are frivolous. (For example, Appellants argue that they had no notice of the proposed

sale. Appellants were aware that the Trustee, in accordance with the Order Denying Application To Dismiss Debtor's Petition of July 24, 1969 (approved as to form by Appellants' attorney) had been actively advertising and soliciting offers for the purchase of the property for over 3-1/2 years before this sale. Appellant Dr. You's medical office throughout this period was, and still is, located in the building which Debtor owned. He paid his rent monthly to the Trustee. He could see the "For Sale" sign. Appellant and his attorneys attended numerous court hearings and took part in numerous meetings and conversations where the Trustee reported on the status of prospective purchasers. Notice of the proposed sale was sent to Appellants on

January 2, 1973 over 30 days in advance of the hearing. Appellants were present at the series of hearings on February 5, 6, 7 and 21, 1973, cross examined witnesses, presented evidence and arguments, requested and were granted a continuance and were given full procedural and substantive due process.)

Some of the contentions are moot. (For example, after the court ordered the sale of the real property, Appellants did not file a supersedeas bond or even make any request that the court stay the sale pending appeal. The Trustee was bound, both by his contractual obligation to the purchaser and by the court order to carry out the sale and he did so. The property, upon consummation of the sale, left the pos-

session and control of the Trustee and the jurisdiction of the court. The purchasers of the property are not parties in this case and never entered any appearance or participated in any proceedings before the court (except as spectators at the hearing when the sale to them was approved). There is nothing the Trustee can now do to recover the property and this contention is therefore moot.)

The Ninth Circuit Court correctly found that Appellants' contentions were without merit, frivolous, not properly before the court, or moot.

All of Appellants' contentions are discussed in greater detail in the Brief of Appellee which was filed in the Ninth Circuit Court, a copy of which is attached as Exhibit "A".

2. There Are No "...special and important reasons..." For the Court to Review this Case.

The supposed conflict between the circuits suggested by Appellants, does not exist under the facts of this case.

The Second Circuit in In Re Pure Penn Petroleum Co., Inc., 188 F.2d 851 2nd. Cir. 1951) was considering a sale of all the Debtor's assets consisting of plant and equipment and an oil and gas lease under an arrangement under Chapter XI of the Bankruptcy Act. The court pointed out that Chapter XI does not have a provision similar to § 216(10) of Chapter X (11 U.S.C.A. § 616(10)) which provides that a plan of reorganization under Chapter X may include the sale of all or any part of the debtor's property at not less than a fair upset

price and distribution of proceeds among the creditors. Under the proposed arrangement in In Re Pure Penn Petroleum Co., Inc. the Debtor's property was to be sold and the proceeds used to pay one class of unsecured creditors (merchandise creditors) in full leaving enough to pay less than 50% of the claims of other unsecured creditors (salary and noteholders). In that case no trustee was appointed, the debtor simply remained in possession. No creditor's meeting was ever held. No appraisal was made of the assets. The decision does not refer to any effort to advertise the property or to any diligent efforts to obtain the highest price available. The Second Circuit Court, in that case, understandably held that the dissenting unsecured creditor who was not to be

paid in full, had been deprived of the benefits of the provisions of safeguarding a sale of certain assets in an ordinary bankruptcy proceeding.

In this case, Chapter X, not Chapter XI, is the governing law. Here an independent trustee was appointed. He attempted diligently for over 3-1/2 years to effect a favorable sale of the real property. The court appointed a competent and disinterested appraiser. The sale was made subject to the approval of the court. The sale was not part of a plan of reorganization. The sale was for considerably more than 75% of the appraised value. Notice of the proposed sale was given, in accordance with the court's order, to Appellants and to all parties in interest. The unsecured creditors did not oppose the

sale. Those unsecured creditors who appeared at the hearings urged the court to approve the sale. The only dissent in this case was from the stockholder who would not share in the proceeds in any event because the Debtor is insolvent. In this case, the sale of the property was conducted in a manner which provided for all parties the safeguards of a sale in ordinary bankruptcy.

Were the Second Circuit presented with a factual situation such as this it would undoubtedly find, as the Ninth Circuit did, that the sale was conducted in accordance with § 116(3) of the Bankruptcy Act and that the trial court did not abuse its discretion in ordering and approving the sale.

The Third Circuit Court in In Re Solar Mfg. Corp., 176 F.2d 493 (3rd.

Cir. 1949) had under consideration the sale of substantially all of the assets of a condenser manufacturing company. The Chapter X proceeding commenced December 14, 1948. Only 7 months later, on July 5, 1949, the trustees sought a court order for the sale of virtually all of the assets of the corporation. The court noted that the trustees had brought the cash position of the company up to $499,487, had disposed of unproductive assets and that the conduct of the enterprise under the trustees had shown a very considerable improvement over that under the previous management. The court's decision does not refer to efforts, if any, which had been made to formulate a feasible plan of reorganization. The court noted that the sale contemplates a "pretty severe sacrifice

in selling properties far below appraisal." The Securities and Exchange Commission objected to the sale as did the labor union representing the employees of the company and a debenture holder on behalf of himself and other debenture holders.

In the present case the Trustee had tried for over 3-1/2 years to formulate a feasible plan of reorganization. He sought suggestions for a plan from all parties in interest including Appellants. Although the Appellants repeatedly over a course of several years assured the Trustee that they would provide additional equity capital necessary to successfully reorganize, they never provided it. The Trustee attempted to obtain capital from other sources and in fact, did arrange for a

loan for some additional capital. However, because the plan used debt rather than equity it was not considered by the court to be sufficiently feasible to warrant approval.

The Trustee in this case concurrently with his efforts to reorganize the Company, had exerted diligent and thorough efforts to effect a favorable sale of the property. He advertised it for sale in the Hawaii newspapers as well as the Wall Street Journal. He placed a "For Sale" sign on the property. He printed and distributed information sheets and brochures for the property. He discussed it with over 200 interested parties or prospective purchasers. The sale finally approved by the court was the most favorable offer presented to the Trustee during the

entire 3-1/2 years. It is fair to say that this sale was more favorable than would have been received at an auction sale "on the block" or at a sale under the ordinary bankruptcy provisions with the stigma of bankruptcy depressing the price.

In this case, unlike in In Re Solar Mfg. Corp., neither the Securities and Exchange Commission nor any debenture holder or other creditor objected. The secured creditors urged the court to approve the sale. This is perfectly understandable. The secured creditors, although the assets were sufficient to pay them in full with interest, had been stayed for over four years from enforcing their legal rights to payment. The unsecured creditors (including Appellant's nephew) even though they would

not be paid in full, urged the court to approve the sale. In this case the only objection to the sale was made by a stockholder who would not have been entitled to participate in any event whether the sale had been made as part of the plan of reorganization or in ordinary bankruptcy.

It is reasonable to suppose that if the Third Circuit Court were presented with an appeal under the facts of this case it would probably have found as the Ninth Circuit did that the sale complied with the law and that the trial court did not abuse its discretion in approving the sale.

It is, therefore, evident that this case presents no real conflict between circuits and no other reason of the special importance required by Rule 19

of the Rules of the Supreme Court of the United States.

3. Review Would Cause Delay and Needless Expense to this Estate.

At the time of the hearings on the sale of the real property in February 1973, the Trustee testified that if the sale were approved the proceeds would be sufficient to pay approximately 75% of the principal amount of the claims of unsecured creditors. Since that time, the estate has been put to the unanticipated expense of defending three appeals by the same Appellants to the Ninth Circuit Court and now is incurring the further expense of defending this Petition For Writ of Certiorari. If this court should grant the Petition, the estate will be required to incur further costs of

defense of such a magnitude that the dividends ultimately payable to unsecured creditors will be further eroded and may even be eliminated entirely.

No creditor in this case (except for the holder of the first mortgage who was paid monthly installments for a substantial portion of the proceeding) has received one dollar for the last six years since this proceeding started. Annual inflation, particularly the double digit inflation experienced recently, daily erodes the value of their claims. Further review of this case would merely prolong the hardship.

CONCLUSION

For the above reasons, it is respectfully requested that the Petition

be denied.

DATED: Honolulu, Hawaii,

October 29, 1974.

Respectfully submitted

Thomas W. Flynn

THOMAS W. FLYNN

H. William Burgess

H. WILLIAM BURGESS

NO. 73-2209

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 16 1973
CLERK

IN THE MATTER OF YORK INTERNATIONAL BUILDING, INC.,

Debtor.

YORK INTERNATIONAL BUILDING, INC., DEBTOR, AND DR. RICHARD W. YOU, STOCKHOLDER,

Appellants,

vs.

AARON M. CHANEY, TRUSTEE, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, MORTGAGEE, THE LIBERTY BANK OF HONOLULU, AND MID-PAC LUMBER, LTD., OF HONOLULU, KENNETH AND ROSE DUNN, CREDITORS, ET AL.,

Appellees.

On Appeal from the United States District Court
For the District of Hawaii

BRIEF OF APPELLEE AARON M. CHANEY, TRUSTEE

BURGESS & GELBER
(H. WILLIAM BURGESS)
Ten Marin Street
Honolulu, Hawaii 96817

Attorneys for AARON M. CHANEY,
Trustee-Appellee.

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NO. 73-2209

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF YORK INTERNATIONAL BUILDING, INC.,

Debtor.

YORK INTERNATIONAL BUILDING, INC., DEBTOR, AND DR. RICHARD W. YOU, STOCKHOLDER,

Appellants,

vs.

AARON M. CHANEY, TRUSTEE, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, MORTGAGEE, THE LIBERTY BANK OF HONOLULU, AND MID-PAC LUMBER, LTD., OF HONOLULU, KENNETH AND ROSE DUNN, CREDITORS, ET AL.,

Appellees.

On Appeal From the United States District Court
For the District of Hawaii

BRIEF OF APPELLEE AARON M. CHANEY, TRUSTEE

STATEMENT OF THE CASE

This will supplement Appellants' Statement of the Case.

When this proceeding began on September 23, 1968, the debtor was in poor condition. Its mortgage and other obligations were in default. Its operating expenses were delinquent. On June 28, 1968, a mortgage foreclosure proceeding had been started in the Hawaii State Court by Massachusetts Mutual Life Insurance Company, holder of the 1.35 million dollar first mortgage. In addition, various judgment, mechanics' and tax liens had been filed against the corporation's building and the land on which it was located. The debtor's principal asset, its office building was dirty, needed maintenance and painting and was in a state of disrepair. The walls leaked. The air-conditioning system had broken down. The basement had been flooded. There was no alarm system. The parking facilities were inadequate. Tenants were withholding or refusing to pay rent. The corporation had many long term leases with tenants at unconscionably low rentals. The corporation's records and books were missing in part and those that were available were not kept in accordance with generally accepted accounting principles. Funds of the principal stockholders had been intermingled with corporate funds. The lease of the corporation's major tenant, the Pacific Exchange System (PACEX), a United States Government Agency, covering

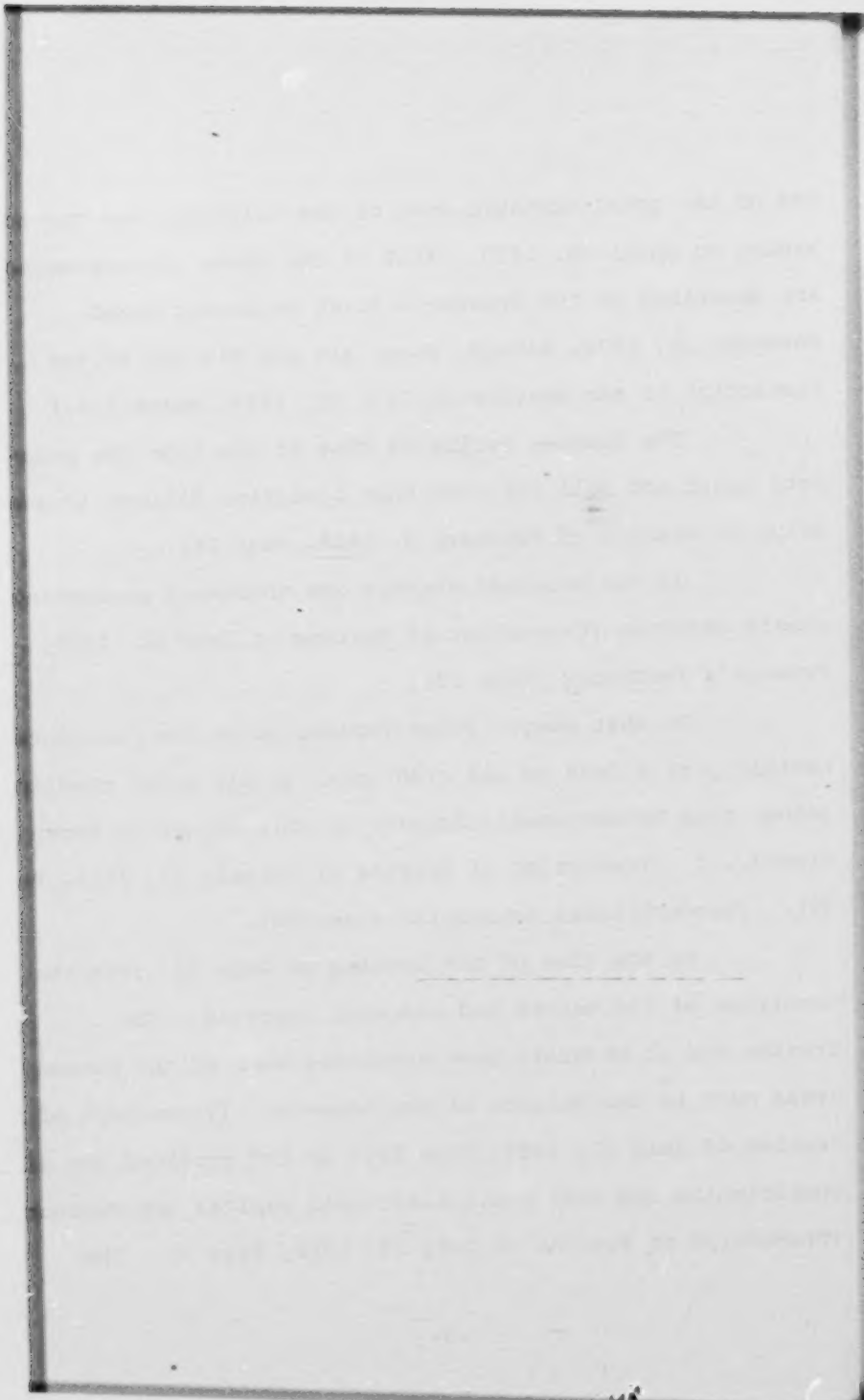
60% of the total rentable area of the building, was due to expire on April 30, 1970. (All of the above circumstances are described in the Trustee's Brief Statement dated November 25, 1970, Record, Pages 815 and 816 and in the Transcript of the Hearing of July 22, 1969, Pages 1-6.)

The Trustee estimated that at the time the property could not sell for more than a million dollars (Transcript of Hearing of February 3, 1969, Page 26).

It was marginal whether the Chapter X proceeding should continue (Transcript of Hearing of July 22, 1969, Trustee's Testimony, Page 37).

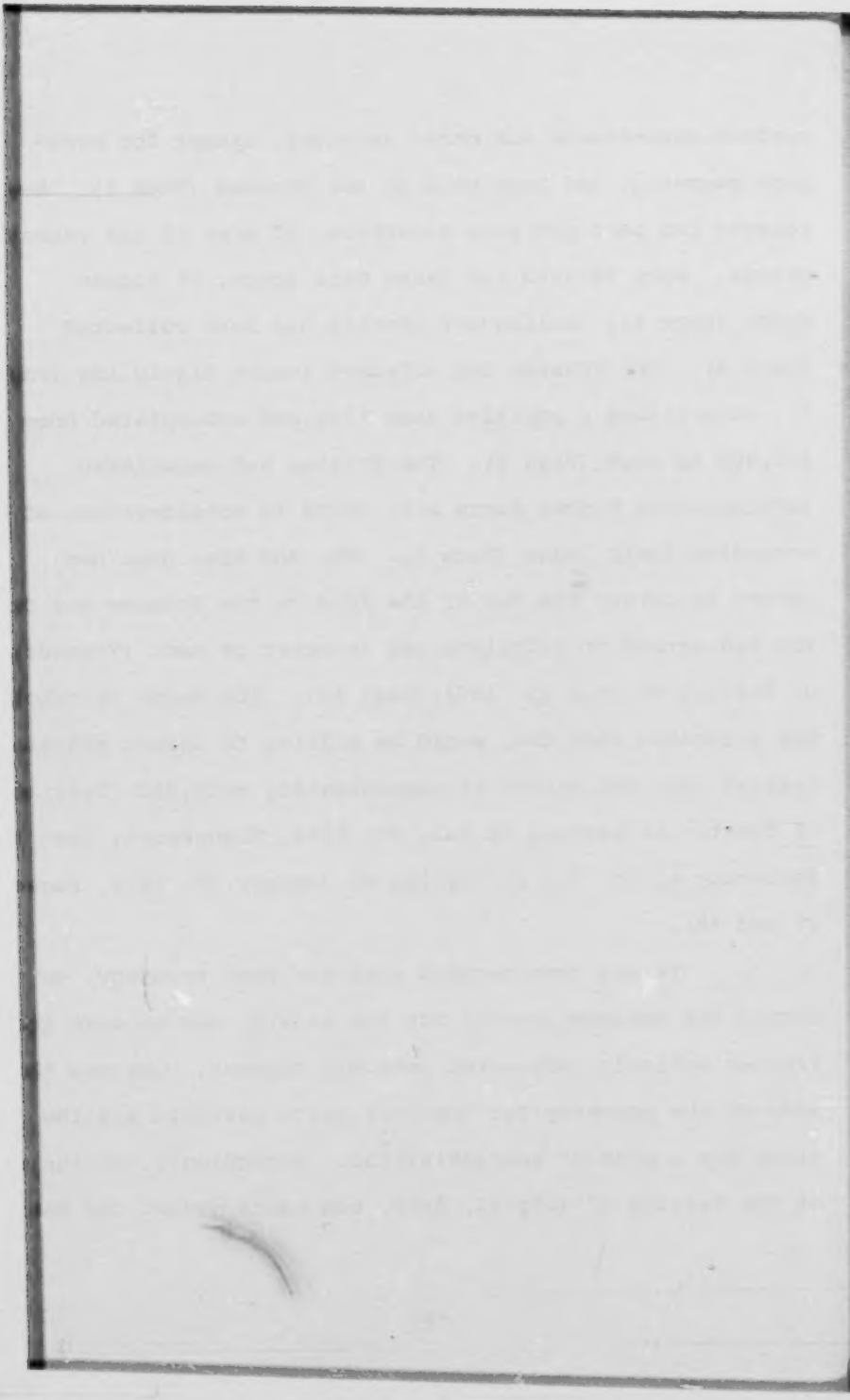
At that stage, Judge Tavares noted the "absolute certainty of a loss to all creditors, to all other creditors (other than Massachusetts Mutual) if this matter is foreclosed..." (Transcript of Hearing of January 27, 1969, Page 56). (Parenthetical expression inserted).

By the time of the hearing on July 22, 1969 the condition of the estate had somewhat improved. The Trustee had at moderate cost repainted some of the common areas much to the delight of the tenants. (Transcript of Hearing of July 22, 1969, Page 2). He had repaired the air conditioning and made small additional capital improvements. (Transcript of Hearing of July 22, 1969, Page 5). The



current operational and other expenses, except for mortgage payments, had been paid by the Trustee (Page 5). New tenants had been put into possession of some of the vacant spaces. Some tenants had taken more space, at higher rents (Page 4). Delinquent rentals had been collected (Page 4). The Trustee had effected tenant discipline (Page 6), established a positive cash flow and accumulated some $81,000 in cash (Page 5). The Trustee had negotiated substantially higher rents with PACEX in consideration of extending their lease (Page 8). Mr. and Mrs. Dunn had agreed to convey the fee of the land to the Trustee and Dr. You had agreed to quitclaim any interest he had. (Transcript of Hearing of July 22, 1973, Page 12). The major stockholders had indicated that they would be willing to inject additional capital into the estate of approximately $150,000 (Testimony of Trustee at Hearing of July 22, 1969, Transcript, Page 11; Testimony of Dr. You at hearing of January 27, 1969, Pages 47 and 48).

It was then decided that the best strategy, to obtain the maximum benefit for the estate, was to have the Trustee actively pursue two possible avenues. One was the sale of the property for the best price possible and the other was a plan of reorganization. Accordingly, at the end of the hearing of July 22, 1969, the court denied the Motion



by Massachusetts Mutual Life Insurance Company to Dismiss the Chapter X Proceeding and directed the Trustee to actively advertise and solicit offers for the purchase of the real property and authorized him to take the other necessary steps to attempt to formulate a plan of reorganization. (Record, Pages 228-232).

The Trustee thereafter actively pursued both avenues.

In pursuing the possibility of a plan of reorganization, the Trustee analyzed and contested numerous creditors' and stockholders' claims (Record, Pages 328 through 426) resulting in the reduction in the total creditors' claims from $3,872,318.31 plus interest to $1,810,603.05, including interest to December 31, 1970. (Brief Statement, Record, Page 841).

He rejected one of the unconscionable leases (Record, Page 934) and this enabled him to renegotiate the others without litigation.

He negotiated a new lease with the Department of Education of the State of Hawaii for approximately 50% of the total leaseable area of the building. (Record, Page 818).

To rid the building of its former reputation he changed the name from "York Building" to "1270 Queen Emma

Building". (Hearing of February 7, 1973, Page 43).

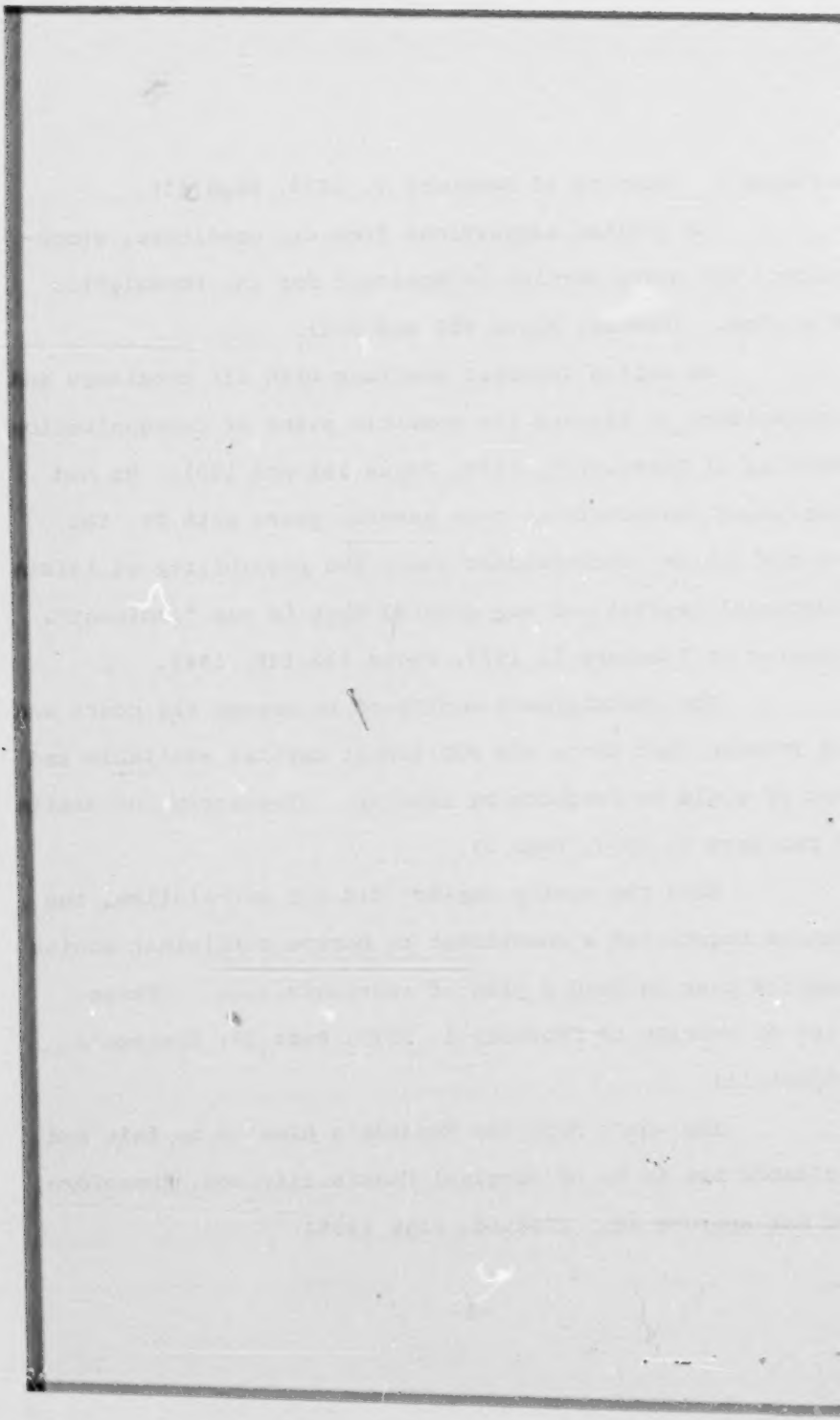
He invited suggestions from all creditors, stockholders and other parties in interest for the formulation of a plan. (Record, Pages 821 and 822).

He called informal meetings with all creditors and stockholders to discuss the possible plans of reorganization. (Hearing of February 7, 1973, Pages 151 and 152). He had continuing conversations over several years with Dr. You and the insider stockholders about the possibility of raising additional capital and was assured that it was "imminent". (Hearing of February 7, 1973, Pages 130-138, 154).

The stockholders continued to assure the court and the Trustee that there was additional capital available and that it would be forthcoming shortly. (Transcript of Hearing of February 5, 1973, Page 3).

When the equity capital did not materialize, the Trustee negotiated a commitment to borrow sufficient monies from the bank to fund a plan of reorganization. (Transcript of Hearing of February 6, 1973, Page 38; Trustee's Exhibit 11).

The court held the Trustee's plan to be fair and equitable but to be of marginal feasibility and, therefore, did not approve it. (Record, Page 1238).



The Trustee described his sales activities at the hearing on April 14, 1973 (Transcript, Page 23, commencing at Line 21):

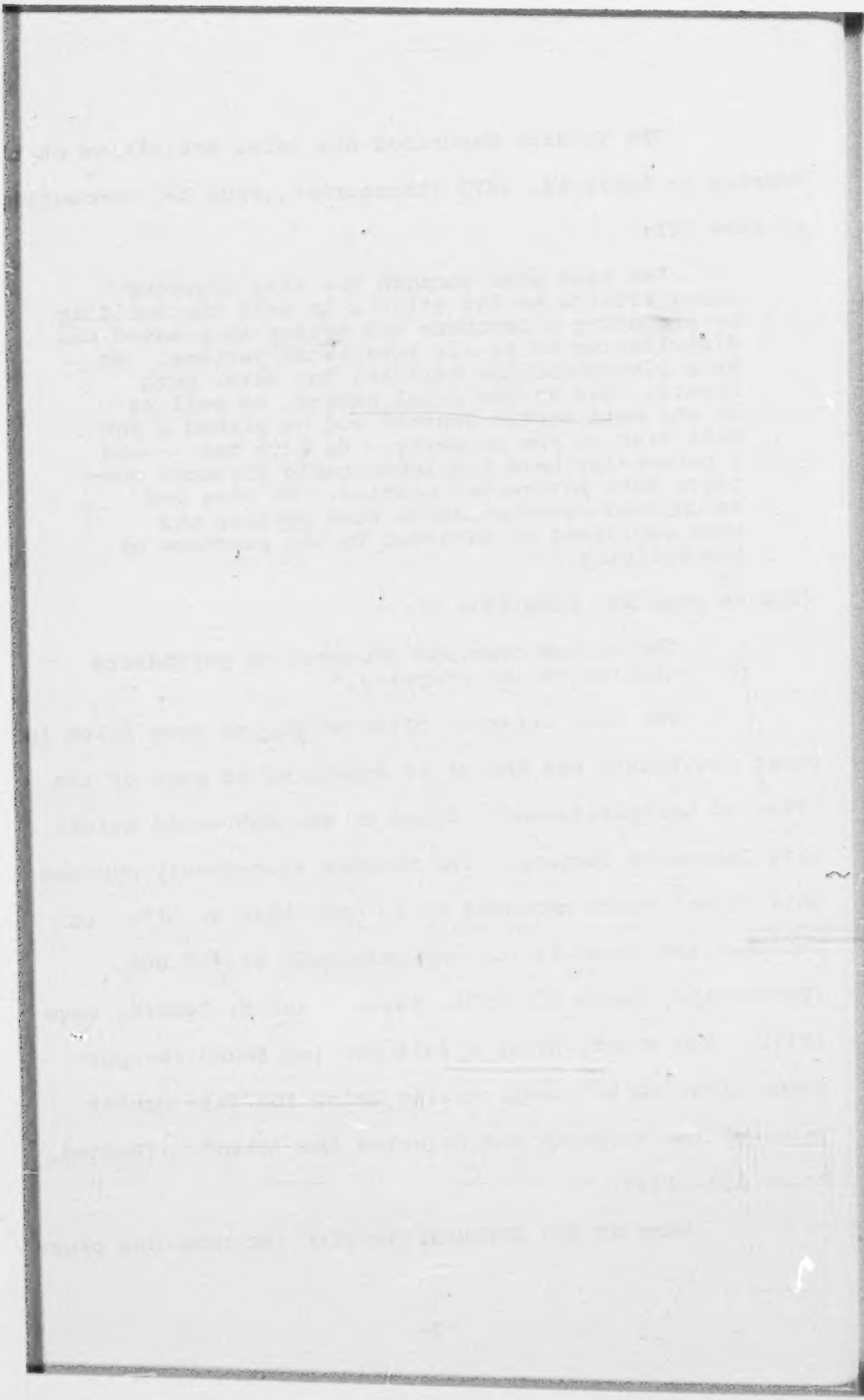
> "We have gone through the very rigorous sales efforts or the efforts to sell the building by preparing a brochure and having it printed and distributing it to all interested parties. We have advertised the building for sale, both locally, and in the local papers, as well as in the Wall Street Journal and we placed a for sale sign on the property. We have had -- and I personally have had innumerable personal contacts with interested parties. We have had voluminous correspondence from parties who have expressed an interest in the purchase of the building."

(and at Page 48, Line 15):

> "We've had over 200 prospective purchasers or inquiries on the property."

The only purchase offer which had been filed in court previously was the offer submitted as part of the "Plan of Reorganization" filed by Massachusetts Mutual Life Insurance Company. The Trustee strenuously opposed this "Plan" which amounted to no more than an offer to purchase the property for approximately $1,450,000. (Transcript, March 10, 1972, Pages 7 and 8; Record, Page 1011). The court, after a full hearing found the purchase offer to be substantially below the fair market value of the property and rejected the "Plan". (Record, Pages 1134-1136).

None of the discussions with the numerous pros-



pective purchasers resulted in an offer as favorable as the offer received from National Securities and the Lims. (Hearing of February 6, 1973, Page 81).

At the beginning of the hearings commencing February 5, 1973, the Trustee's recommendation to the court was that either the Trustee's Plan of Reorganization or the sale to National Securities would be in the best interests of the estate. (Hearing of February 5, 1973, Pages 1 and 2).

The court at the hearings of February 5, 6, 7 and 21, 1973, listened to the testimony, examined the documentary evidence, considered the positions of the various parties and the arguments of their counsel and finally found that it was in the best interests of the estate that the real property be sold, that the offer received from Mr. and Mrs. Lim was a fair and reasonable price for the property and directed the Trustee to sell the property. (Order Authorizing Sale of Real Property, Record, Pages 1238-1240).

The Trustee in accordance with the court's order and the sales contract conveyed the property to the purchasers, received the full purchase price and completely consummated the sale. (Affidavit of Aaron M. Chaney dated July 6, 1973 filed with the Motion to Dismiss Appeal on July 11, 1973).

ARGUMENT

1. A SALE OF PROPERTY IS NOT THE SAME AS A PLAN OF REORGANIZATION. THE BANKRUPTCY ACT ESTABLISHES PROCEDURES FOR SALES OF PROPERTY AND ENTIRELY DIFFERENT PROCEDURES FOR A PLAN OF REORGANIZATION. THIS APPEAL DEALS WITH A SALE OF PROPERTY. THE PLAN OF REORGANIZATION PROCEDURES DO NOT APPLY AND WOULD BE INAPPROPRIATE. THE COURT IN THIS CASE PROPERLY FOLLOWED THE PROCEDURES FOR THE SALE OF PROPERTY.

Appellants argue that the Order Authorizing Sale of Real Property is void because it deprives them of their property without due process of law. (Appellants' Brief, Page 33).

To support this contention, Appellants' reasoning runs as follows: In a Chapter X proceeding a "sale" is also a "reorganization". As a reorganization, a sale is subject to the same procedural requirements as any other plan of reorganization. The court did not follow the regular course laid out for approval and confirmation of reorganization plans. Therefore, the order deprives them of their property without due process and is void. (Appellants' Brief, Pages 33 to 36).

Appellants' argument fails because a sale of property is entirely different from a plan of reorganization and the procedures to be followed are also entirely different.

The mandatory provisions of a plan of reorganization are set forth in § 216 of Article X of Chapter X of the Bankruptcy Act (11 U.S.C.A. § 616). A contract for the sale of property would normally not contain any provision altering or modifying the rights of the seller's creditors, or provide for the payment of costs and expenses of administration or rejection of executory contracts or prohibit non-voting stock or contain any of the other mandatory provisions of § 216. A real estate salesman who tried to insert such provisions in his sales contracts would probably not earn many commissions. A sale of real property, such as we are dealing with in this case, consists of an offer, acceptance, hearing, court approval and conveyance of the property. None of the mandatory provisions for a plan of reorganization are required by the Bankruptcy Act or by any case law or custom or common sense in the case of a sale of property.

Section 172 of the Bankruptcy Act (11 U.S.C.A. § 572) requires that the court after hearing on a plan of reorganization, if the scheduled indebtedness of the debtor exceeds three million dollars shall, and if the schedule indebtedness does not exceed three million dollars may, submit the plan to the Securities and Exchange Commission for examination and report. It would make no sense for the judge to submit proposed sales of real property to the Securities and Exchange Commission. Real property sales are not within the particular expertise of the Securities and Exchange Commission and they could offer little of value to the court in considering property sales.

Section 174 of the Bankruptcy Act (11 U.S.C.A. § 574) requires that the court enter its order approving a plan of reorganization if in the judge's opinion the plan complies with the provisions of § 216 and is fair and equitable, and feasible. A sale of property, such as in this case, would not comply with the provisions of § 216. "Fair and equitable" as used in Chapter X are words of art denoting the absolute priority

doctrine and other unique concepts applicable only to a plan of reorganization. There would be no reason for a sale of property to comply with § 216 or with these unique concepts.

Section 175 of the Bankruptcy Act (11 U.S.C.A. § 575) requires that upon approval of a plan by the judge the trustee submit the plan together with summaries and other materials to creditors and stockholders who are affected by the plan. This procedure would be unnecessary where a sale of property has already been approved by the court after full hearings.

Section 179 of the Bankruptcy Act (11 U.S.C.A. § 579) provides that, after a plan has been accepted by two-thirds of the creditors of each class affected by the plan, another hearing be held to consider the confirmation of the plan and objections to confirmation. This procedure would be unnecessary in the case of a sale of property and would be so time consumming and cumbersome that it would impede and obstruct most sales.

Section 221 of the Bankruptcy Act (11 U.S.C.A. § 621) provides that the judge shall confirm a plan if

he is satisfied that among other things, Article X of Chapter X has been complied with and the identity, qualifications and affiliations of the persons who are to be directors or officers or voting trustees have been fully disclosed. A sale of property would not comply with Article X and would not disclose directors, officers or voting trustees and would have no reason to do so.

Section 228 of the Bankruptcy Act (11 U.S.C.A. § 628) provides that upon consummation of the plan the judge shall enter a final decree discharging the debtor from all its debts and liabilities. There would be no reason to discharge the debtor from any liabilities upon the consummation of a sale of property.

It is easy to see from the brief review above, that the complicated provisions and procedures for plans of reorganization under Chapter X cannot be forced to fit sales of property. Indeed if, to sell property, it were necessary to go through these long, complex and expensive steps, it would as a practical matter be virtually impossible for a Chapter X estate ever to sell property.

Three cases are cited by Appellants in support of their assertion that a "sale" is also a "reorganization" and that, therefore, the same procedures must be followed. However, not one of those cases supports such an assertion.

In re Lorraine Castle Apartments Bldg. Corp. 149 F.2d 55 (7th Cir. 1945) dealt with a trustee's plan of reorganization which provided that the major asset of the corporation, an apartment building, be offered for sale at public auction for not less than $75,000 and that the proceeds be used to pay bondholders in full with principal plus interest and the balance to stockholders. The trustee's plan further provided that if the upset price could not be realized a new corporation would be formed the capital stock of which would be issued to bondholders. The debtor had proposed a plan of reorganization which would allow stockholders to participate without paying bondholders in full. The court disapproved the debtor's plan but approved the trustee's plan. The court held that the trustee's plan was within the language of § 216(10) of the Bankruptcy Act (11 U.S.C.A. §616(10)) which provides that a plan of

reorganization "...may include...the sale of all or any part of its property...at not less than a fair upset price..." and that the trustee's plan was fair and equitable.

In re Chelsea Hotel Corp., 246 F.2d 133 (3rd Cir. 1957) held, over the objection of stockholders, that a plan of reorganization may provide for the liquidation of the debtor's property, a well known boardwalk hotel in Atlantic City, New Jersey.

In re Porto Rican American Tobacco Co., 112 F.2d 655 (2nd Cir. 1940), the court approved the trustee's plan of reorganization which provided for the immediate sale of the debtor's principal asset. The court held, over the objection of stockholders, that a plan involving ultimate liquidation is not contrary to the terms of the reorganization provisions of the Bankruptcy Act, citing § 216(10).

These three cases simply recognize that a plan of reorganization may include a sale of the principal assets of the debtor. Not one of them holds that a sale of the principal assets of the debtor must be done by a plan of reorganization. Not one of these

cases even suggests that procedures for a sale or property under Chapter X must follow the same procedures as for a plan of reorganization.

In this case the sale of the property is not part of any plan of reorganization. The buyer and the seller did not choose to structure it as part of a plan and indeed there would be no reason for them to do so.

Further, even if this sale were included as a part of a plan of reorganization, the corporation would be insolvent since its total assets including the sales price and the other assets would be less than the total liabilities. Under the absolute priority doctrine (6A Collier on Bankruptcy ¶99.10, P. 214) and under § 216(8) of the Bankruptcy Act (11 U.S.C.A. §616(8)) the stockholders therefore would be prohibited from participating in the plan. The stockholder Appellants would receive nothing either under the sale of the property or under a plan of reorganization which includes the sale and therefore in that event would not benefit in the slightest from such procedure.

The jurisdiction of the court and the procedures to be followed for the sale of real property in a Chapter X proceeding are well established.

Section 116 of Chapter X of the Bankruptcy Act (11 U.S.C.A. § 516) provides that,

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court -
>
> . . .
>
> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;..." (Emphasis added.)

The jurisdiction of the court and discretion of the judge in Chapter X to sell real property of the debtor are discussed in 6 Collier on Bankruptcy, ¶ 3.27[2] at Page 623,

> "Section 116(3) confers jurisdiction to authorize a lease or sale of real or personal property by the trustee or debtor 'upon cause shown.' What constitutes sufficient cause must necessarily depend upon the circumstances of each case, but the matter rests in the sound discretion of the judge. As a general proposition, a lease or sale may be ordered where it is to the advantage of the estate, or where it will aid the ultimate objective of the proceeding, or where

the property is perishable. Certainly, an improvident lease or sale should not be permitted. But the fact that a sale may eventually compel liquidation is not a controlling consideration. We have seen elsewhere that if a petition is approved as filed in good faith, the plan of reorganization later proposed may provide for a sale of the property that is in effect a liquidation. This is because circumstances may disclose that such a course is the only acceptable method of financial relief. Likewise, under § 116(3) if the facts impel a decision that the debtor's property be sold prior to the working out of a reorganization plan, the judge may authorize the sale to be made. And even if such disposition involves all the income-producing property of the debtor, the order may be justified. Section 116(3) says 'any property of the debtor, whether real or personal', and even though the sale may practically prevent the adoption of a reorganization plan and thus defeat the purpose of the proceeding, it may be permitted where conditions warrant." (Emphasis added.)

As to the notice required, Collier continues at Page 628:

"Authorization by the judge under § 116(3) must be made 'upon such notice as the judge may prescribe'. Section 58a(4), requiring notice of all sales of property except on certain conditions, has no applicability under Chapter X unless bankruptcy liquidation is ordered, since it is inconsistent and in conflict with § 116(3). Conceivably the judge under § 116(3) may order a lease or sale without notice, if under the circumstances an immediate lease or sale is necessary. The lease or sale

> ay be made 'upon such terms and conditions' as the judge may approve. Section 70f, which among other things requires an appraisal before a sale and prescribes certain restrictions concerning sales by auctioneers, is expressly made inapplicable under Chapter X by § 102 unless and until an order is entered that bankruptcy be proceeded with. Hence the judge may if he sees fit order a sale without an appraisal. Nor is the judge bound by the terms of General Order 18, dealing with sales of property, for by virtue of General Order 52(2) this order is likewise inapplicable under Chapter X unless the judge orders that bankruptcy be proceeded with. A disposition of property, according to the sound discretion of the judge, may be made by public or private sale, in bulk or in parcels, for cash or credit, and subject to or free from liens. Where property is sold, the title thereto shall be conveyed to the purchaser by the trustee or debtor in possession."

Thus it can be seen that the judge has jurisdiction under Chapter X to order sale of the debtor's property prior to working out of a reorganization plan even if such disposition involves all of the income producing property of the debtor and even though the sale may prevent the adoption of a reorganization plan, if in the sound discretion of the judge such an order is justified. The sale may be made "upon such notice as the judge may prescribe" or even without notice if an immediate sale is necessary in the discretion of the judge.

In this case the Application for Approval of Sale of Real Estate or Approval of Plan or Other Instruction was filed December 29, 1972. (Record, Page 1163). The court fixed January 19, 1973 as the date for hearing and ordered the Trustee to give notice in the form attached to the court's order by mail to all creditors, stockholders, and certain other parties in interest. (Record, Pages 1198 and 1199).

The Trustee mailed the required notice to all creditors and stockholders on the same day, December 29, 1972. (Trustee's Affidavit of Mailing, Record, Pages 1262 through 1264).

The original hearing date was postponed at the oral request of both the attorneys for the Appellants and the attorneys for Massachusetts Mutual Life Insurance Company. The first hearing on the proposed sale and the proposed plan was held on February 5, 1973. (Transcript of Hearings, January 19, 1973 and February 5, 1973).

Thus the Appellants were given formal notice of the proposed sale of the real property more than thirty (30) days prior to the first hearing, considerably more than the minimum time required by the Bankruptcy Act.

As to the form of notice, even under § 58a(4) of the Banrkuptcy Act (11 U.S.C.A. § 94a(4)), there is no particular form of notice required by the Bankruptcy Act or General Orders. 3 Collier on Bankruptcy, Page 500. The form of the notice in this case sets forth all of the essential terms of the proposed sale and the form was approved by the court in advance. (Record, Pages 1200 and 1201).

Appellants complain at Pages 35 and 36 of their brief that there was no prior notice of the sale to the Lims. This point was not raised before the trial Judge and is presented for the first time on appeal.

The Lim offer was not delivered to the Trustee until the afternoon just before the last hearing. (Transcript of Hearing, February 21, 1973, Page 163). If National Securities had submitted a higher bid, the court would, no doubt, have allowed it. However, National Securities did not choose to make any higher bid. If the Lim offer were less favorable than the proposed sale to National Securities or if it adversely affected the rights of Appellants, the Appellants' complaint might have some validity. However, the Lim sale was significantly more

favorable to the estate in that the cash down payment was much greater and there was no real estate commission. The sale to the Lims, rather than the less favorable sale to National Securities, could not conceivably have any adverse effect on the Appellants.

The events leading up to the sale to the Lims are somewhat analogous to the procedures followed in the Hawaii State Courts in the sale of real property by a probate estate. Under § 531-29, Hawaii Revised Statutes, after the executor or administrator enters into a contract for the sale of real property of an estate, a notice of the proposed sale is sent to interested parties and published. At the hearing other interested purchasers are permitted to submit higher bids. The court then approves the sale most favorable to the estate. This probate scheme for obtaining the best prices for estate sales would be destroyed if it were necessary to republish and have further notice and hearing before the highest bid could be accepted.

The probate procedure is similar to what happened in this case, the result of which was that this

estate received the benefit of a sale substantially more favorable than that originally proposed. This favorable sale would have been lost if the court had to send out further notices and to schedule a later hearing. (Transcript of Hearing, February 21, 1973, Page 193).

The court signed the Order Authorizing Sale of Real Property on March 2, 1973 (Record, Page 1235). Appellants had received formal written notice of the proposed sale two months before.

The hearings were conducted on four different days over a period of more than two weeks from February 5 to February 21, 1973. The hearings were postponed twice at the request of the attorneys for Appellants. At the hearings, the Appellants cross-examined witnesses, presented documentary evidence, gave testimony of their own witnesses, and presented arguments to the court. Appellants were given a full opportunity to be heard and fully availed themselves of this opportunity.

The court heard the evidence, weighed the conflicting testimony, considered the positions of the various interested parties, and finally made its finding

of fact that it was in the best interests of the estate that the real property be sold, that the Lim offer was a fair and reasonable price for the property, and that it was in the best interests of the estate that the sale to the Lims be approved and authorized. These findings of fact by the trial court have not been contested in Appellants' opening brief and are overwhelmingly supported by the record.

In summary then the record shows that the Order Authorizing Sale of Real Property was properly issued after due notice and full hearing and in compliance with all of the requirements of the Bankruptcy Act. The Appellants were afforded their full constitutional rights and were not deprived of their property without due process.

2. THE COURT DID NOT ABRIDGE APPELLANTS' CONSTITUTIONAL RIGHTS BY DENYING THEIR MOTION FOR RECONSIDERATION WITHOUT ORAL ARGUMENT. THEIR MOTION PRESENTED NO NEW ISSUE OF FACT OR LAW AND AMOUNTED TO NOTHING MORE THAN A REQUEST TO REARGUE MATTERS WHICH HAD ALREADY BEEN FULLY LITIGATED. DELAY WOULD HAVE PREJUDICED THE ESTATE.

Appellants argue at Page 37 of their brief that the court abridged their constitutional rights by denying their motion for reconsideration without a hearing.

Appellants' "Motion for Reopening, Rehearing and Reconsideration" states eight "grounds" (Record, Pages 1246 and 1247). Reading of these "grounds" show them to be simply eight sentences of argument. No fact is asserted which was not presented at the hearings. No issue of law is raised which was not argued at the hearings.

The trial court in its order denying the Motion stated: "The motion itself in its 'eight grounds' does but set forth conclusitory arguments on matters which were heretofore fully explored and squarely decided by the court adversely to Dr. You, in the course of the hearings leading up to the court's ordering the sale of debtor's property. Not even one new or unresolved fact or question of law is presented by the motion (except possibly counsel's assumption of ignorance on the part of the court as set forth in Ground 8)." (Record, Page 1254).

There is no authority found anywhere in the

Federal Rules of Civil Procedure for a motion for "re-opening, rehearing or reconsideration".

Motions for a new trial or to alter or amend judgments are provided for under Rule 59 of the Federal Rules of Civil Procedure. Appellants' Motion for Reopening, Rehearing and Reconsideration could conceivably be construed as a motion for new trial or to alter or amend the judgment.

The three grounds for new trial most commonly known in court (non-jury) actions are manifest error of law, manifest error of fact, or newly discovered evidence. 6A Moore's Federal Practice, ¶59.07, Page 59-94. However, new trial or rehearings are not granted simply to reargue or relitigate.

> "Just as at law, a rehearing in equity and its present counterpart, a new trial in a court action, will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial. ..."

6A Moore's Federal Practice ¶59.07, Page 59-93.

A motion for new trial is addressed to the discretion of the trial court and is not subject to reversal unless the court has abused its discretion.

"As the motion for new trial is addressed to the discretion of the trial court, its ruling on such motion is not subject to reversal unless its order was made under the compulsion of a mistake of law, or it failed to exercise its discretion, or abused its discretion."

6A Moore's Federal Practice, ¶ 59.07, Page 59.99.

Even if Appellants' motion is given the benefit of the doubt and considered as a motion for a new trial or to alter or amend judgment under Rule 59, it falls short, on its face, of stating any meritorious ground. It states no manifest error of law. It does not include a single legal citation. It points out no manifest mistake of fact on the part of the court. (Indeed, Appellants in their entire opening brief do not even assert that the court's findings of fact are erroneous.) The motion points to no newly discovered evidence. The motion does not raise a single issue of fact or law which was not raised at the four previous hearings before the court.

There is no constitutional requirement for oral argument on motions generally. It is not unusual for trial and appellate courts to direct that motions be submitted upon motion papers and briefs without oral argument. For example, Rule 6 of the Rules of the United States Court of Appeals for the Ninth Circuit provides,

"(e) No Oral Argument unless Ordered. Motions may be considered and decided in chambers, and no oral argument will be allowed unless requested by the court. In the event the court requests oral argument upon a motion, fifteen minutes shall be allowed to each side unless otherwise ordered."

Also, see, Bagby v. United States, 199 F.2d 233 (Ca. 8th 1952) where the local rules of the district court provided that motions for summary judgment would be taken as submitted upon the motion papers, without oral argument, unless a party makes a request therefor.

The Ninth Circuit, in Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) has said in considering a motion for summary judgment, "But, in view of the language of Rule 56(c), and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied." In that case, the Ninth Circuit was considering a motion for summary judgment which was granted without the opposing party having a right to oral argument. The effect of

granting the motion was to dispose of the case on the merits without the party ever having had his day in court. It is easy to understand why this court would so hold in that case. However, the present case is entirely different. This is no motion for summary judgment. The Appellants have had their full day in court. The Appellants attended hearings on four different days extending over more than two weeks, presented documentary evidence and testimony of witnesses, cross examined witnesses, and were given a full opportunity to present their case. Appellants had a full hearing on all points stated in their motion.

Even in the case of motions for summary judgment, there are circumstances where oral argument is dispensed with. "But even when a party is entitled to oral argument, as a general proposition there will be circumstances when a court may properly terminate oral argument or even dispense with it." 6 Moore's Federal Practice, ¶56.14[1], Page 2258. Sarelas v. Prikos, 320 F.2d 827, 828 (7th Cir. 1963) and Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963).

Finally, the most compelling justification for

the court's denial of Appellants' motion without oral argument was the harm which could be caused by delay. Appellants filed the motion on March 8, 1973 (Record, Page 1245) and set it for hearing on March 19, 1973 (Record, Page 1250). This hearing date was some 27 days after the hearing on February 21, 1973 at which the court had orally authorized the sale of real property. The offer from Mr. and Mrs. Lim for the purchase of the property was dated February 19, 1973 and provided that "This offer to purchase is subject to final approval of the court within 60 days after the initial approval but not to exceed more than 65 days from the date of contract." (Trustee's Exhibit 17, February 21, 1973). This provision was inserted by the purchasers so that if the court's approval had not become final within 65 days from the date of the contract (that is by April 24) they would have the right to withdraw the offer. Appellants' motion, by tolling the running of the time for appeal, delayed the finality of the court's order. If the hearing were held as scheduled on March 19, 1973 and the order denying the motion not signed until sometime thereafter, the delay would have jeopardized and, perhaps, caused the loss of this advantageous sale for the estate.

Appellants Motion for Reopening, Rehearing and Reconsideration was no more than a request to reargue. Appellants had already enjoyed a full hearing on all points mentioned in the Motion. It can hardly be said that the court's refusal to allow Appellants to rehash the same arguments at another hearing has deprived Appellants of any rights whatsoever. Delay could have severely damaged the estate by jeopardizing the best offer received in 5 years of administration of this estate.

The court in the exercise of its sound discretion, found the motion on its face to be not in compliance with the court's rules of procedure, to present no issue of law or fact which had not already been fully argued at the previous hearings, and properly and wisely denied the motion.

3. APPELLANTS' CLAIM THAT THEY WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS BY STATEMENTS MADE AT A HEARING ONE AND A HALF YEARS AGO IS NOT ONLY WITHOUT MERIT BUT IS IRRELEVANT TO THIS APPEAL.

Appellants on Pages 37, 38 and 39 have picked

out from the record isolated comments of the court on April 14, 1972 at a hearing on interim allowance for the Trustee. The Judge's comments which are complained of by the Appellants, when read as part of the entire record, are quite proper and well taken. The Judge recognized the Trustee's superb efforts which had held off the foreclosure action, rehabilitated the building, removed the non-paying tenants, raised the rents, achieved 98% occupancy, established order out of chaos in the records, accomplished a postive cash flow and brought the corporation up to a condition where it might be possible to pay the creditors and, with new capital, even to salvage something for stockholders. (See Statement of the Case, this Brief).

After the hearing on April 14, 1972, Judge Tavares allowed interim compensation to the Trustee. (Record, Page 1129). Appellants were aware of this allowance and had the right to petition this court for leave to appeal under § 250 of the Bankruptcy Act (11 U.S.C.A. § 650) and under Rule 6 of the Federal Rules of Appellant Procedure. They did not appeal. The time has long passed (over one and a half years) for appeal

of that order. It is not now before this court and is entirely irrelevant to the present appeal.

4. APPELLANT YOU IS NOT ENTITLED TO HAVE THE VALUE OF THE FEE "RESTORED". ALL HIS CLAIMS AGAINST THE ESTATE WERE SETTLED BY VOLUNTARY STIPULATION THREE YEARS AGO.

Appellants argue on Page 39 of their brief that Appellant You should have the full value of the fee "restored" to him if the sale is not voided.

Appellant You had originally held title to the land on which the York Building was later located. He leased it to the debtor corporation.

On June 2, 1966, as part of the transaction under which Massachusetts Mutual Life Insurance Company made its loan of $1,350,000, the debtor corporation and Dr. You mortgaged the building and land to Massachusetts Mutual Life Insurance Company. (Record, Page 68, Transcript of Hearing, February 3, 1969, Pages 44, 58).

On June 27, 1966, by Deed recorded in Liber

5365 at Page 563, Dr. You conveyed the fee title to the land to Mr. and Mrs. Dunn as security for a $120,000 loan to the corporation. (Transcript of Hearing of July 22, 1969, Page 12).

By July of 1969, the Massachusetts Mutual Life Insurance Company mortgage had a balance including principal and delinquent interest and fees of approximately $1,500,000. (Transcript of Hearing of July 22, 1969, Page 27).

Dr. You in July of 1969 did not have legal title to the land and had little or no equity in the land since any interest he had was subordinate to the $1,500,000 balance of the Massachusetts Mutual Life Insurance Company mortgage, the $120,000 lien in favor of Mr. and Mrs. Dunn and the judgment and tax liens of various other creditors. (Transcript of Hearing of February 3, 1969, Pages 61, 62, 63 and 64).

The Trustee estimated the value of the property (land and building) to be about one million dollars when the Chapter X proceeding started. (Transcript of Hearing of February 3, 1969, Page 26).

The circumstances of the conveyance of the

fee interest to the Trustee were described by the Trustee in his testimony at the hearing of July 22, 1969 (Transcript commencing at Page 12, Lines 4 through 26, and Page 13, Lines 1 through 4)

> "You perhaps would be in a better position to give further details, but we have met with the representative of the Dunn family, Mr. and Mrs. Dunn, who presently hold title to the fee of the land underlying the building. As you recall, York International has a leasehold interest only, its main asset being in the building per se, and that the land is being leased from Mr. and Mrs. Kenneth Dunn. Mr. and Mrs. Dunn took fee title to the land as security for a $120,000 loan to the corporation. And if Mr. and Mrs. Dunn are willing to convey, we have oral assurances and/or documents to convey the fee of the land to the trustee as an assist in attempting to save the estate.
>
> Q And a quit claim deed has been prepared and forwarded to the Dunns for signature?
>
> A To the Dunns for signature.
>
> Q And also for signature by Dr. You for claiming any interest he may have in the fee of the land to you as trustee?
>
> A Right.
>
> Q And we have been assured by their attorneys, Mr. Wilfred Youth and by Mr.

Edward Kim on behalf of Dr. You, that their clients will execute a quit claim deed?

A Yes. So what we have done, Your Honor, is to bring the fee title into the estate."

Dr. You was present at the hearing as was Mr. Wilfred Youth, the attorney for Mr. and Mrs. Kenneth Dunn, and Harold Fong, the attorney for the debtor, now the Appellant. (Transcript of Hearing of July 22, 1969, Page 22).

The Trustee also testified as to his plans to attempt to sell the property for the best possible price. (Transcript of Hearing of July 22, 1969, commencing at Page 24, Line 17).

"A I am sorry I did cause confusion there, Mr. Bunn. My position is to continue to operate the estate, to get a sale, currently to offer the property for sale. So that whatever is the best will be for the benefit of the creditors.

Q And if I understand you correctly, what I am saying is, your wish is to continue to expose this for sale?

A Yes.

Q Attempting to get what you consider

a fair and equitable price for the property?

A Yes, sir.

. . ."

(Transcript of Hearing of July 22, 1969, Page 25, commencing at Line 24, and Page 26, Lines 1 and 2).

"Q So you wish to continue to advertise this, to expose it for sale to realtors?

A Yes, sir.

Q Seeking to get a price --

A The best possible price there is."

The attorney for Massachusetts Mutual Life Insurance Company asked specific questions about the conveyance of the fee at Pages 28 and 29 and, finally, in argument to the court, the attorney for the Trustee stated at Page 36:

"As to the latest development as to the conveyance of the fee, Your Honor, we have the assurance of Mr. Youth who is present in Court and also Mr. Fong who is present in Court, -- and Dr. You himself is present

> in Court -- that all of the necessary parties will convey and sign quickly the conveying interest in the fee to Mr. Chaney as trustee. This means that the trustee has at his disposal for use either as part of the plan of reorganization or as part of the sale of the property the total assets, including leasehold interest and the fee simple, ..."

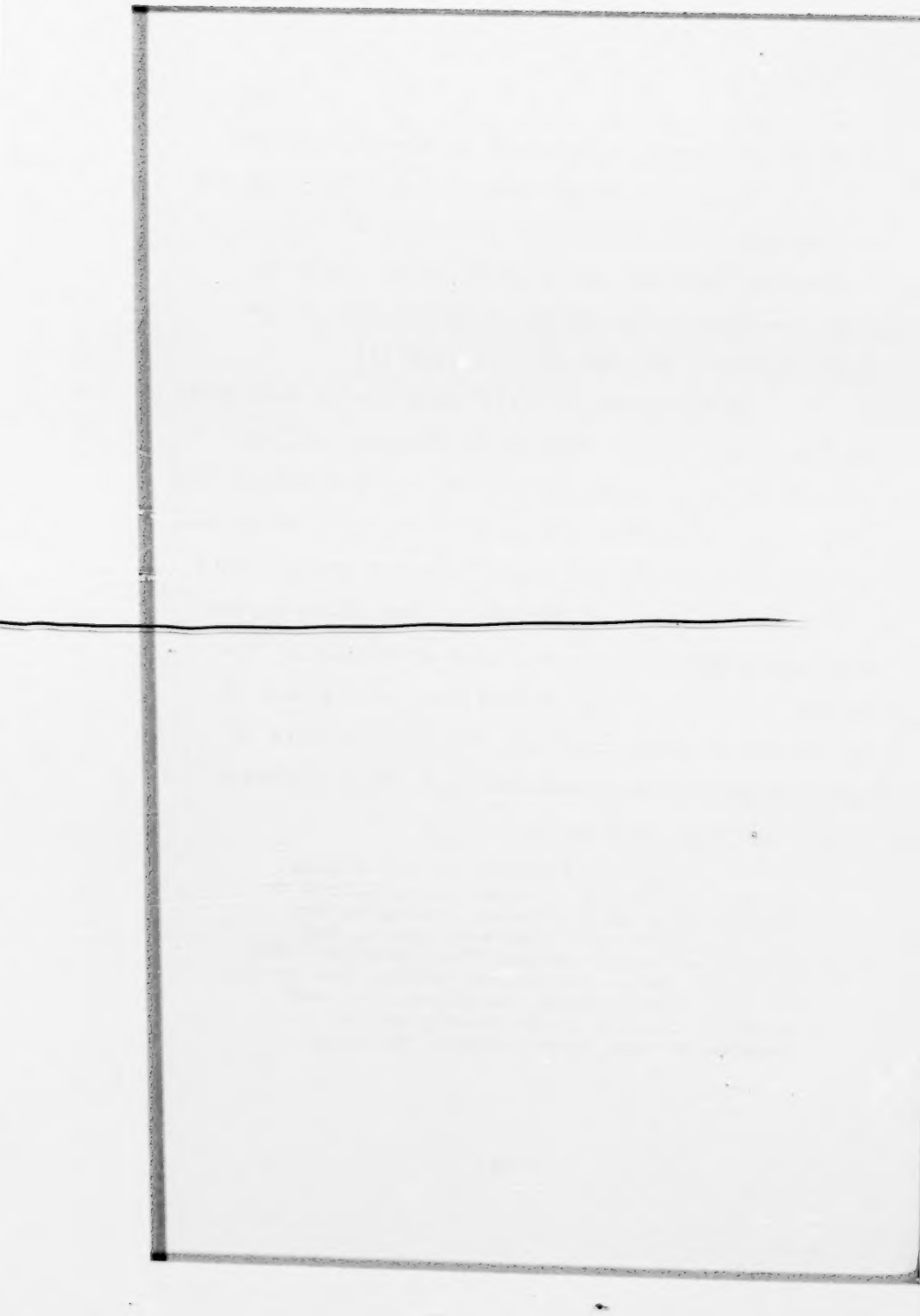
There is no suggestion of any agreement, express or implied, on the part of the Trustee to pay Dr. You any "compensation" for his quitclaim of any interest he might have in the land. Indeed, if anyone were to be compensated it would have been either Massachusetts Mutual Life Insurance Company or Mr. and Mrs. Dunn or the other creditors who held tax and judgment liens on the property. The conveyance by Mr. and Mrs. Dunn, who held legal title, was a conventional quitclaim deed unconditionally conveying to the Trustee all right, title and interest in the property. It was clearly discussed that the Trustee would make an active effort to sell the property and there was not the remotest suggestion that in the event of a

sale, Dr. You would be entitled to any compensation.

Following the hearing, Mr. and Mrs. Dunn and Dr. and Mrs. You executed and delivered to the Trustee a Quitclaim Deed for the property dated August 19, 1969, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 6657 at Page 242.

On September 10, 1970, more than a year after the conveyance of the land to the Trustee, Dr. You entered into a stipulation with the Trustee whereby his various claims against the corporation would be allowed jointly with that of the other "Insider" stockholders, Dr. Herbert M. Nam, Dr. Timothy I. Wee, Eisho Toyama and Andrew Park as a subordinated stockholders' interest in the total sum of $180,000 "subordinate to all claims of other creditors and all interests of other stockholders allowed herein." They expressly stipulated that this was in

> "...full satisfaction of all claims by said claimants, whether as creditors or stockholders or otherwise, including any and all claims for interest, costs, and attorneys' fees, against YORK INTERNATIONAL BUILDING, INC., the debtor herein, the estate of York International Building, Inc. and AARON M. CHANEY, individually and as Trustee of York International Building,



Inc. and said claimants release said debtor, estate, individual, and Trustee from any and all further and other claims, interests, and liens of whatever nature."

This Stipulation was signed by Dr. Richard W. You, his wife, Eleanor S. N. You, and approved as to form by Edward Y. N. Kim, one of the present attorneys for the Appellants. (Record, Page 771). This Stipulation was approved by the court on November 16, 1970. (Record, Page 792).

No objection or question was ever raised by Appellants in the trial court as to compensation for the conveyance of the land to the Trustee or as to Dr. You's voluntary stipulation. The time for raising these questions has long passed. The land was conveyed to the Trustee over four years ago. Dr. You's stipulated claim was filed in court and approved by the court three years ago. It is far too late for the Appellants now to raise these issues for the first time before this court. These issues are entirely irrelevant to the present appeal.

5. THE COURT HAD FULL JURISDICTION TO CANCEL THE NAM AND DUNN LEASES AS ORDERS IN AID OF EXECUTION

OF ITS JUDGMENT. THESE ORDERS WERE NOT APPEALED FROM AND ARE NOW FINAL.

Appellants argue on Page 41 of their brief that the District Court lacked jurisdiction to hear and determine the petitions for cancellation of the Nam and Dunn leases. However, these leases (which were still of record but which should have been specifically cancelled under previous agreements) had to be cancelled in order to clear title to the property. These orders were necessary in order to enable the Trustee to carry out the sale of the real property as authorized by the court. These were orders in aid of execution of the court's judgment directing the Trustee to sell the property. The court's judgment was not superseded.

Moore's Federal Practice provides as follows:

> "The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. It divests the district court of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes under Rule 69(a) of the Federal Rules of Civil Procedure or Rule 36 of the Federal Rules of Criminal Procedure, or in aid of execution of a judgment that has not been superseded, until the district court receives the mandate of the court of appeals. ..." (Emphasis added.)

9 Moore's Federal Practice, Appeals to Court of Appeals, ¶ 203.11, Page 734.

At the trial court neither Dr. Nam nor Mr. and Mrs. Dunn, the only parties in interest, raised any question of the court's jurisdiction to issue these orders in aid of execution of the court's judgment. Both Dr. Nam and the Dunns subsequently executed cancellations of the leases. The time for appeal has expired. No appeal was filed. These orders have become final.

Appellants claim that these proceedings were void for lack of notice (Page 41, Appellants' brief) citing 11 U.S.C.A. § 606 (Bankruptcy Act § 206).

However, § 206 of the Bankruptcy Act (11 U.S.C.A. § 606) does not give the debtor, every creditor, stockholder and indenture trustee the right to notice of every step taken in the proceeding.

> "Two questions may arise: (1) whether § 206 gives the debtor, every creditor, stockholder and indenture trustee the right to notice of every step taken in the proceedings; and (2) if it does not, whether that fact creates any important difference between the status conferred by § 206 and the status conferred by formal intervention. The answer to the first question seems to be that <u>§ 206 does not of itself grant a right to notice of all steps</u> taken in the reorganization.

> In a particular case, the contrary construction might result in much unwarranted difficulty and expense. The requirements for notice in Chapter X have been constructed along more flexible lines. Certain provisions in the chapter state that notice shall be given and specify the persons to whom it shall be given, including creditors, stockholders and indenture trustees. Other provisions require notice but beyond that are silent. Section 207, however, gives the judge of the reorganization court the continuing power 'to enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.' Thus those matters deemed by Congress to be of paramount importance specifically require notice to the parties included within § 206; in other situations, the question of notice rests in the discretion of the judge, to be exercised either as to whom notice shall be given and the form thereof if notice is required by the statute without further specification, or as to whether notice shall be given at all and to whom, etc., in cases where Chapter X is silent. Thus, as remarked by Professor Gerdes, there seems to be adequate assurance that creditors, stockholders and indenture trustees will receive notice of all important steps in the proceedings. ..." (Emphasis added.)

6A Collier on Bankruptcy, ¶ 923, Page 307.

In the case of the Nam and Dunn leases, the court issued its Order To Show Cause citing Nam and Dunn to appear to show cause why their leases should not be cancelled. (Record, Page 1317). There was no necessity

for notice to the debtor or any other creditors or stockholders since none of them would be in any way adversely affected by the cancellation of the leases. The two leases were cancelled. Both Mr. and Mrs. Dunn and Dr. Nam subsequently signed specific documents cancelling the leases and they have not appealed from the decision.

Thus the Appellants' point, like the earlier points raised by Appellants, is without merit, is raised too late and is irrelevant to the present appeal.

6. THE RIGHTS OF APPELLANT YOU AND THE OTHER PARTIES IN THE DISTRIBUTION OF THE PROCEEDS OF SALE WILL BE DETERMINED IN ACCORDANCE WITH THE PRIORITIES ESTABLISHED BY THE BANKRUPTCY ACT AND THE STIPULATIONS WHICH THEY HAVE ALREADY ENTERED INTO.

Appellants argue at Page 41 of their brief that where a corporation is not insolvent, the stockholders are entitled to participate in a plan of reorganization. There is no question that this is the law.

However, in this case, no plan of reorganization has been approved. The court directed that the real property be sold. It is now apparent that no plan of reorganization can be effected under this estate and that bankruptcy must be proceeded with under § 236(2) of the Bankruptcy Act (11 U.S.C.A. § 636(2)).

The court's finding, cited by Appellants at Page 41 of their brief, that:

> "6. There is an equity in said property over and above all liens, encumbrances and interests."

clearly refers to equity over and above liens and claims directly against the property, not the claims of unsecured creditors to satisfaction from the estate ahead of its stockholders.

Appellants' assertion (at page 42 of Appellants' Brief) that debtor was solvent at the time of hearing is not supported by the record. To show solvency, the record would have to establish that the value of the building and land, the only substantial asset of debtor, exceeded $2,013,191.75 (net liabilities at March 31, 1973, page 42 of Appellants' Brief). However, the record showed and the court found that during all the years of administration of the estate (4-1/2 years at the time of the

Order Authorizing Sale of Real Property) no offer as high as $1,750,000 had been received for the property despite the Trustee's diligent efforts to sell it. (Order Authorizing Sale of Real Property, Record, Pages 1235-1243). Therefore, even if solvency were to be considered in connection with a sale of property, it was not present here.

When the monies are distributed in accordance with the bankruptcy procedures, the payments to creditors, stockholders and other parties in interest will be determined by the priorities established by the Bankruptcy Act and by the stipulations and court orders already entered into as to claims.

Appellant You's rights have already been determined by his voluntary stipulation and are not affected by the order appealed from. This question, like Appellants' other points, is also irrelevant to this appeal.

7. THE APPELLANTS HAVE NOT QUESTIONED THE CORRECTNESS OF THE TRIAL COURT'S FINDINGS OF FACT. THESE FINDINGS, UPON WHICH THE ORDER AUTHORIZING THE SALE OF REAL PROPERTY IS BASED, ARE UNDISPUTED AND THE ORDER SHOULD BE AFFIRMED.

At no place in the Appellants' brief have Appellants questioned the correctness of the findings of fact of the trial court, that it was in the best interest of the estate that the real property be sold and that the offer made by Mr. and Mrs. Lim was a fair and reasonable price for the property.

The trial Judge listened to the witnesses, judged their credibility, heard the arguments of the various opposing factions, some of whom favored the sale of the property and some of whom opposed it. After full hearing and after weighing all these factors the Judge made his findings and issued his order.

Rule 52 of the Federal Rules of Civil Procedure provides in part that

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court the judge of the credibility of the witnesses".

The Federal Rules of Civil Procedure apply to bankruptcy cases by virtue of Bankruptcy General Order No. 37 which provides in part that

> "In proceedings under the act the Rules of Civil Procedure for the District Courts of the United States shall insofar as they are not inconsistent with the act or with these General Orders be followed as nearly as may be."

8. IN ANY EVENT, THE APPEAL IS MOOT AND SHOULD BE DENIED.

After the Appellants noted their appeal from the Order Authorizing Sale of Real Property, the Trustee petitioned the court for instructions and the court instructed the Trustee that, "Such order has not been stayed and the Trustee is, therefore, still authorized to proceed with the sale." (Record, Page 1311).

The purchasers, Mr. and Mrs. Lim, advised the Trustee that they intended to enforce the sale and demanded that the Trustee proceed to close the sale as ordered by the court. (Affidavit of Aaron M. Chaney dated July 6, 1973, filed with the Motion to Dismiss Appeal on July 11, 1973). Had the Trustee not proceeded to carry out the sale he, or the estate, or both, would have been subject to suit for breach of contract by the purchasers as well as possible liability to the creditors of the estate. Also, he would, or might, have been in contempt of court. The Trustee concluded that he had no choice to but consummate the sale. (Affidavit of Aaron M. Chaney dated July 6, 1973).

Accordingly, the Trustee proceeded to close the

sale. The purchasers paid the purchase price. The Trustee executed and delivered the deed and possession of the property to the purchasers. The deed was recorded. The moneys were disbursed from escrow and the sale was completely consummated. (Affidavit of Aaron M. Chaney dated July 6, 1973).

The Appellants knew that in spite of their appeal the Trustee was contractually obligated to complete the sale, that he had been ordered by the court to complete the sale and that the purchasers were insisting on his completing the sale. The Appellants, nevertheless, filed no supersedeas bond and made no motion to stay the sale.

When the sale was completed, title and possession of the real property were delivered to the purchasers. This removed the property from the jurisdiction of the court. The purchasers are not parties to this action or to this appeal. Their valid contract rights have attached and there is now nothing the Trustee can do to retrieve the property.

This appeal, aside from all its other shortcomings, presents nothing more than an academic question. It is moot and should be denied.

The law on this point is set forth in the Trustee's Memorandum of Law (Dismissal of Appeal which has become Moot by Consummation of Sale - No Supersedeas Bond filed) filed with this court on August 10, 1973 and will not be repeated here.

CONCLUSION

For all the above reasons, it is respectfully requested that this court affirm the District Court's Order Authorizing Sale of Real Property.

DATED: Honolulu, Hawaii, November 12, 1973.

BURGESS & GELBER

By H. William Burgess
H. WILLIAM BURGESS

Attorneys for AARON M. CHANEY,
Trustee-Appellee

NO. 73-2209

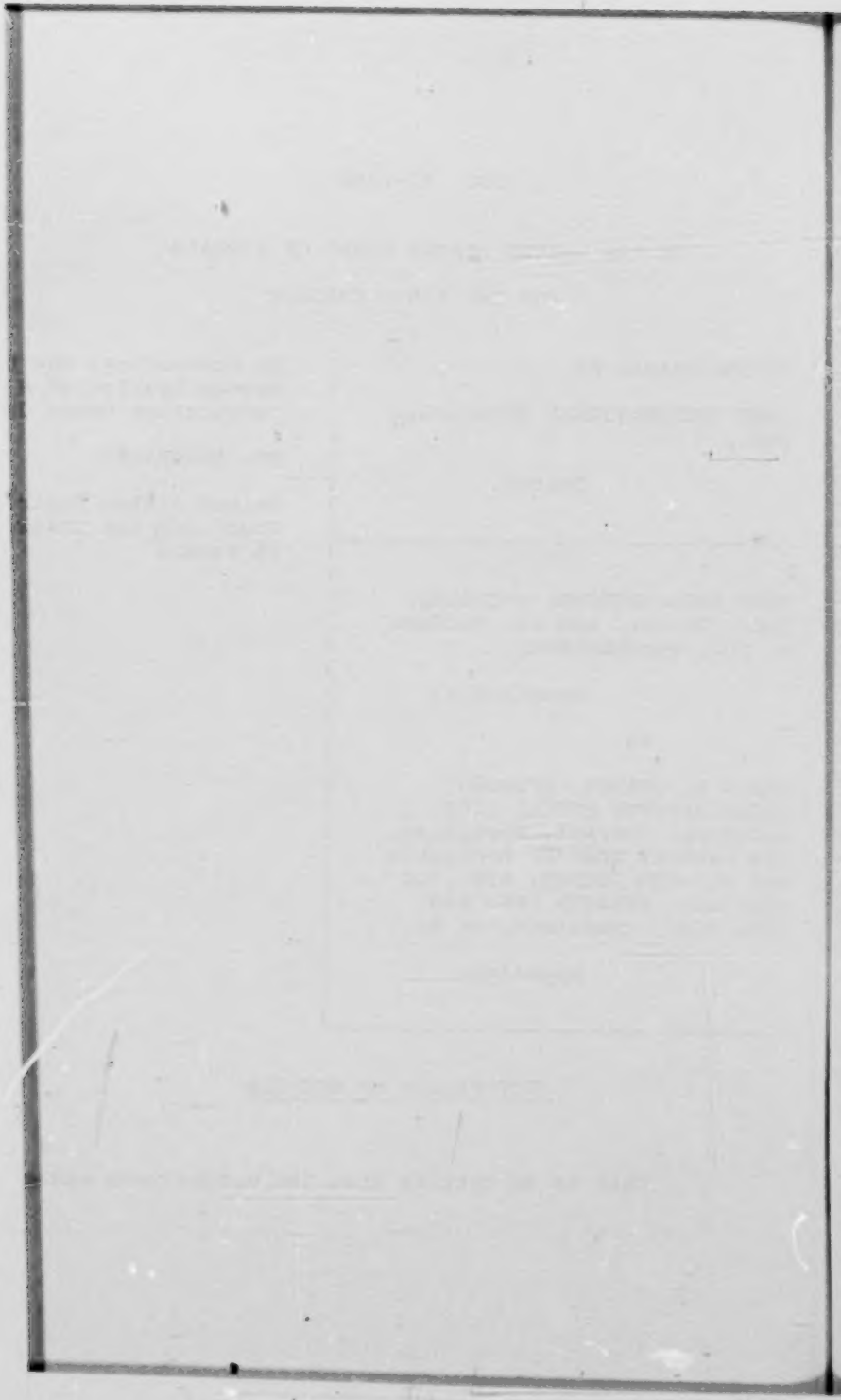
IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of YORK INTERNATIONAL BUILDING, INC., Debtor.	In Proceedings for the Reorganization of a Corporation Under Chapter X NO. BK-68-293 United States District Court, for the District of Hawaii
YORK INTERNATIONAL BUILDING, INC., Debtor, and DR. RICHARD W. YOU, Stockholder, Appellants, vs. AARON M. CHANEY, Trustee, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Mortgagee, THE LIBERTY BANK OF HONOLULU, and MID-PAC LUMBER, LTD., of Honolulu, KENNETH DUNN and ROSE DUNN, creditors, et al., Appellees.	

CERTIFICATE OF SERVICE

This is to certify that the undersigned caused



the foregoing document to be duly served by mailing copies of the same in the United States mail with postage prepaid on November 14, 1973 and addressed to the following:

MRS. HELEN B. RYAN
Suite 207, 1136 Union Mall
Honolulu, Hawaii 96813

THOMAS P. HUBER, ESQ.
Cades, Schutte, Fleming & Wright
1700 First Hawaiian Bank Building
Honolulu, Hawaii 96813

KWAN HI LIM, ESQ.
Room 223, 33 South King Street
Honolulu, Hawaii 96813

WILFRED H. C. YOUTH, ESQ.
1412 Amfac Building
Honolulu, Hawaii 96813

CLERK, United States District
Court, For the District of Hawaii
Third Floor, Federal Building
Honolulu, Hawaii 96813

BRUCE HONG, ESQ.
Deputy Attorney General
State of Hawaii
Hawaii State Capitol
Honolulu, Hawaii 96813

WILFRED H. HUMPHRIES, ESQ.
Suite 411, 33 South King Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, November 14, 1973.

H. WILLIAM BURGESS

H. WILLIAM BURGESS

SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-385

In the Matter of
YORK INTERNATIONAL BUILDING, INC.,

Debtor-Appellant,

and

DR. RICHARD YOU,

Stockholder-Appellant,

vs.

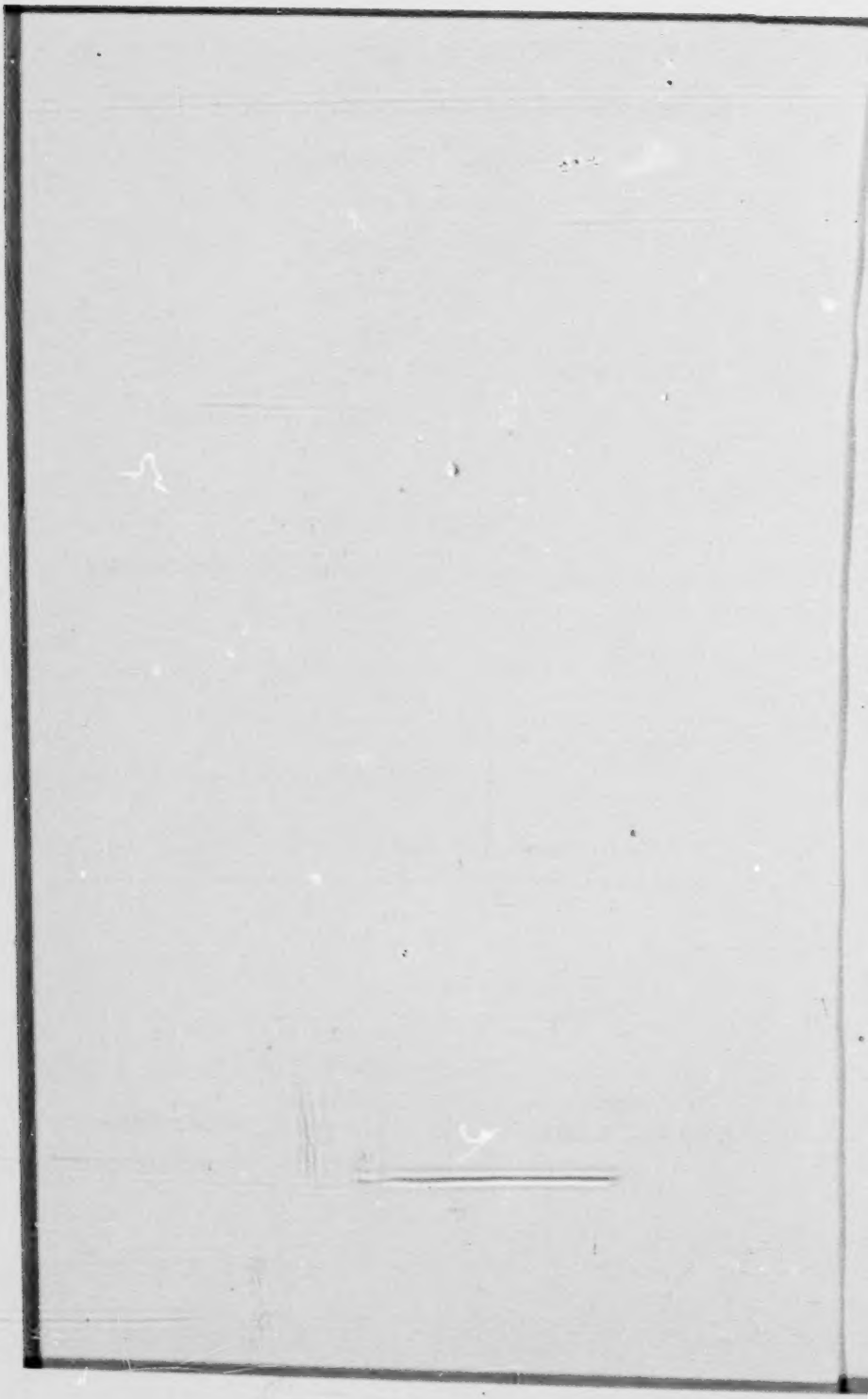
AARON M. CHANEY,

Trustee-Appellee.

APPELLANTS' REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

HELEN B. RYAN
1136 Union Mall
Suite 207
Honolulu, Hawaii 96813
Attorney for Appellants

Of Counsel:
RYAN & RYAN



IN THE

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Trustee-Appellee.

APPELLANTS' REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Appellee's brief in opposition emphasizes the necessity of review of this Court, particularly to make clear, certain, and uniform the interpretation and the proper application of 11 U.S.C., Section 516(3).

1. Appellants contend that this Court has already spoken in Fidelity Assurance Association v. Sims, 318 U.S. 608 (1943). This case is not cited by the Appellee; rather it is ignored, just as it has been ignored by the Ninth Circuit.

2. Appellant has shown how the Ninth Circuit has applied to the instant case the rulings announced by it in the reported cases of In Re Wonderbowl, Inc., 424 F.2d 178, (9th Cir., 1970), and In the Matter of Equity Funding Corp. of America, 492 F.2d 793 (9th Cir., 1974). Appellee cites neither of these cases, yet in both cases the Ninth Circuit admits there is a conflict between the Circuits.

3. The argument of the Appellee for denial, based upon the effect of inflation, defeats itself. If the sale is set aside, the creditors and the stockholders will reap the benefit of the "double digit inflation experienced recently," and will be able to reorganize or sell at a price which will pay to all the full value of their holdings.

4. The inclusion of the Appellee's briefs,

originally filed in the Ninth Circuit, is not to the point and they are useful, if at all, to show the "shotgun" approach to the law employed by the Appellee in the District as well as the Ninth Circuit Court.

5. The questions presented are not moot. The purchasers are not bona fide without notice, but actually personally participated in the sale, knowing that the owner of the asset was a corporation seeking reorganization under Chapter X, and that the sale was made in the reorganization proceeding. It was the purchasers who "expedited" the acceptance of their offer on the same day, and within an hour of its first distribution in the courtroom. In fact, Trustee-Appellee, at the court's direction, told the court:

> "I have discussed this with both Mr. and Mrs. Lim, Your Honor, and it was their intent in submitting the offer that the decision would be made today and it would not be one that would hang fire. If the Court would rule that the sale be made to Mr. and Mrs. Lim today, fine, they will proceed and close the transaction within 60-65 days. If on the other hand the Court were to decide to defer this matter for 30 days, they would

withdraw their offer therefor." (Tr. 2/21/73, p. 193.)

A writ of certiorari should be granted if corporate reorganizations under Chapter X are to have meaningful statutory and constitutional safeguards.

DATED: Honolulu, Hawaii, November 4, 1974.

Respectfully submitted:

Helen B. Ryan

HELEN B. RYAN
1136 Union Mall
Suite 207
Honolulu, Hawaii 96813

Attorney for Appellants